80-2164

No.

Office-Supreme Court, U.S.
FILED
JUN 22 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RUSSELL G. SCHLENZ and NANCY A. SCHLENZ,
Lake County, Illinois Appellants,

and

GERTRUDE ANDERSON and 1300 CONSOLIDATED CASES,
Shelby County, Illinois Appellants,

v.

JOHN W. CASTLE, ROBERT JASPER, THE LAKE COUNTY, ILLINOIS, BOARD OF REVIEW, SHELBY COUNTY, ILLINOIS and the ILLINOIS PROPERTY TAX APPEAL BOARD,
Appellees.

On Appeal From The Supreme Court Of Illinois

JURISDICTIONAL STATEMENT

PAUL E. HAMER
Attorney of Record
1356 Shermer Road
Northbrook, Illinois 60062
(312) 272-1800

JACK L. URETSKY
135 S. LaSalle Street
Chicago, Illinois 60603
(312) 372-7842

Attorneys for Appellants

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

Whether an Illinois statute violated the Fourteenth Amendment's Due Process Clause by purporting to obliterate retrospectively appellants' rights to abatement and refund of property taxes levied upon assessment increases which had been invalidated by the State's highest court for want of timely notice?

Whether an Illinois statute violated the Fourteenth Amendment's Equal Protection Clause by purporting to obliterate retrospectively the rights of only those taxpayers who had not obtained final judgment prior to an arbitrary prospective date to abatement and refund of property taxes levied upon assessment increases which had been invalidated by the State's highest court for want of timely notice?

PARTIES IN THE SUPREME COURT OF ILLINOIS

Russel G. Schlenz and Nancy A. Schlenz, were appellees in the court below in proceedings originating in Lake County, Illinois.

Robert Jasper and The Lake County Board of Review and Shelby County were appellants in the proceedings originating in Lake County.

John W. Castle, named in the trial court in Lake County, was not a party on appeal.

The Illinois Property Tax Appeal Board, acting on behalf of taxpayers[1] in 1300 consolidated tax appeals, were appellees in the court below in proceedings originating in Shelby County, Illinois, Gertrude Anderson was the first named taxpayer. Shelby County was the appellant in the proceedings originating in Shelby County.

The Illinois Property Tax Appeal Board did not appeal to this court from the decision of the Supreme Court of Illinois.

The court below consolidated the Lake County and Shelby County appeals.

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[1] List of Shelby County taxpayers:

Gertrude Anderson, Max Anderson, Charles Baker, James & Barbara Bridges, Charles Baker, Hedric Baker, Robert J. Behl, Carl L. Bayless, Mrs. Joseph Behl, John W. Bushue, Jean & Verl Bridges, Robert Behl, Charles Baker, Mrs. Joseph Behl, Robert H. Behl, Robert J. Behl, Oliver E. Baugher, Oliver E. & Merle Baugher, Vernie Boldt, Bobby L. Bridges, Roy Burrell, W. E. & Carol Anderson, William E. & Carol Anderson, W. E. Anderson, L. Ervin Storm, Ervin

(Footnote continued on following page)

[1] *continued*

Storm, Leverett Brown, Carl & Lela Kircher, Garnet Page, David A. Shrake, Dale Bauer, Berniece Chamberlain, Ruth Lockart, Kenneth Robertson, Homer Culver, Henry Doll, Fairy E. Elson, John Elson, Delmar Elzy, Jerry Fearday, Everett Fearday, Irvin Figgins, Garold Gentry, Michael Greuel, Oscar Gentry, Leonard Greuel, Michael Greuel, Norbert Hille, Cecil L. Hardesty, Mary M. Henneberry, Elsie Nippe, Earl Noffke, Frieda C. Noll, Paul Parker, Bige Patterson, William C. Pieper, James Probst, Paul Rennels, Harold Russell, Albert Schumacher, Bernard Schumacher, Glen R. Bieber, Kenneth Carroll, Floyd Christy, David Compton, Donald Compton, Frank Compton, Ken Considine, Donald Cross, Bill Dunaway, Frank H. Dunaway, Daisy F. & Richard R. Heiserman, Daisy & Richard Heiserman, Jesse Heiserman, Doris Kirk, Archie Hicks, Mary M. Henneberry, James Jansen, Vincent Keck, Don M. Keller, Charles Latch, Joe Latch, Phyllis J. and Marian Lindley Krueger, Ervin F. Latch, John Landers, Ruth Luedke, Roy Lear, Walter Levingston, Amom Lindley, Winifred Lindley, Donald Mehl, Gary A. Mercer, Paul E. Montgomery, Faraba & Roy Shirley, Ervin Storm, Paul T. Sheenan, John A. Smith, John Smith, Mark O. Storm, Harold Sudkamp, Mrs. Clarence Sudkamp, Mark O. Storm, Robert J. Strohl, Larry Strohl, Larry E. Strohl, Lee Roy Storm, Austin Spear, Reverdia Storm, Mrs. Clara Schutte, Norbert Schumacher, Jacqueline J. Schutte, Mark O. Storm, Eileen Schutte, Robert F. & Sandra Swengel, Elmer Tabbert, Ed Tucker, Mrs. M. Wood, A. A. Wilson, John F. Wilson, Harry F. Wells, Charles R. Weber, Sr., Theresa Walk, Victor Walk, Joseph Walden, Paul L. Williams, Charles R. Weber, Sr., Charles Walk, Theresa Walk, James Williams, Larry D. Montgomery, Paul Montgomery, Arble Moffitt, Jr., Jennie McAllister, Dean McAllister, Hannah McAndrew, Agnes McClory, R. H. Montgomery, Ervin Moran, Kenneth L. Moran, Jesse S. Morris, Jesse W. Morris, Robert W. Morrison, James E. Meek, Donald Mehl, Oliver E. & Merle Baugher, Roy Burrell, Carl D. Burrell, Bobby L. Bridges, Verl & Jean Bridges, L. Joe Elson, Wayne & Bernice Dewar, Helen E. Curtis, August Doeding, L. Joe Elson, Thelma Elson, Harry Estelle, Irene Ferrell, Wayne & Lawrence Gordon Dewar, Helen & Arnold Huntington, Harold Huntington, Helen Huntington, Merwin Jervis, Ralph Kasey, Charles Latch, Paul Montgomery, Paul E. Montgomery, Laurence E. Montgomery, Laurence & Phyllis Montgomery, Russell & Mable Montgomery, Carl E. Miller, Dean & Jeanette McAllister, Dean McAllister, Jennie McAllister, James

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[1] *continued*

Harold Price, James Probst, Harold Russell, Robert J. Strohl, Bernard Schumacher, Lee Roy Storm, Mary E. Storm, Ed Tucker, Raymond Watkins, Scott Worley, (Est.), Dale D. Wirth, Robert H. Behl, Joe Latch, George & Mildred Probst, Norbert Schumacher, Lee Roy Storm, Charles R. Weber, Sr., Henry Widdersheim, Paul L. Williams, Robert Willenborg, Donald Willenborg, Norbert & Rose Will, William & Paul Walk, Walk Farms, Inc., Virgil M. Walk, Theresa Walk, William Young, Doris Kirk, Jim Kirk, Mrs. L. M. Kirk, Ralph Kirk, Irma J. Koons, Otha L. Mills, Forrest W. Miller, Theo & Evelyn Nohren, Annabel Roadarmel, Keith Snyder, Ervin Storm, Corwin & Gary Tucker, H. A. Van Horn, c/o Corwin & Gary Tucker, Ed Agney, Robert Allen, Carl Allen, James L. Antrim, Max Anderson, Jude Bixler, Florence Elbert, Robert D. Elbert, Forrest G. Elbert, Danny L. Forcum, Fred Gallagher, Thomas Grove, Jewell Isley, Clarence Elbert Isley, Elbert Isley, Harold R. Kennell, Jr., L. C. Lieb, William W. Lewis, Carl Rittgers, Franklin & Pauline Reid, David Compton, Jerry Corley, Ralph Chamberlain, Frank Compton, Everett Denton, Roger Foster, Huber O. Foster, Marie Foster, Ross S. Glick, Harold & Leila Glick, Neva Hinton, Floyd B. Hinton, Mason Horsman, Eugene Hunter, Orville M. Jones, Ralph Kirk, Mrs. Leon Niehaus, John M. Swander, Ervin L. Storm, Sylvia Frost Snyder, L. R. Sommer, C. L. Voudrie, Max Anderson, Eda Bullerman, Emma Beals, Anna Bose, Russell & Evelyn Fall, Emery Grunert, Calvin P. Giesler, Thomas Grove, Elmer Heil, Fred Heil, Edna Jones, Edwin Keller, Everett Kessler, Kenneth Kessler, Oscar Kessler, Dwight E. Kessler, Glen Kessler, Don & Irvin Kessler, Walter Keller, Elnora & Wilbur Meers, Merle Mechling, Earl Noffke, Melvin Ohnesorge, Glenn H. Pieper, William E. Pieper, Edna Probst, Paul Probst, Leatha Rueff, Charles W. Reid, Charles Reid, Jr., Vernon Rincker, Clarence Rosine, Ira Rawdin, Stan & Louis Schutte, Louis Schutte, Jacquline J. Schutte, Shelby Thompson, G. B. Ulmer, Albert Vonderheide, Donald Vogel, Henry Widdersheim, Donald Wendt, Wayne Walden, Paul Whittenberg, Cecil G. Miller, Robert L. Mentzer, LaVonne R. Mentzer, Carl Kircher, Donald Matlock, Garnet Page, Lola B. Bottrell, Louise Bottrell, Bottrell Brothers, Ora E. & Harold Curry, Virgil Collins, Elsie Nippe, Charles J. Rosine, Henry Widdersheim, Lorene Storm, Don C. Westenhaver, Gary Wheeler, Elmer Wheeler, Don C. Westenhaver, T. M. Bennett, Thomas Bennett, Myron Bennett, Freda Dunaway, Frank Dunaway, Frank H. Dunaway, Martha Denier, Bill Dunaway, Burl Evans, Earl Endsley,

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[1] *continued*

Curtis Endsley, Russell Fisher, Everett Gordon, Dale L. Gordon, Marion W. Griffin, Zelma & Richard Gordon, Charles & Richard Gordon, Marita Ann Moore, Vivian Roadarmel, Annabel Roadarmel, P. D. Simmons, Corwin Tucker, Luther Taylor, John Yarnell, Wayne Arnold, Frank Arnold, Robert Allen, Carl Allen, Jude Bixler, Wayne Bushue, J. D. Casstevens, J. D. & Amelia Casstevens, Max Clark, Floyd Erlenbusch, Floyd D. Erlenbusch, Curtis Endsley, c/o Endsley Bros., F. H. Forcum, Rolland D. Giles, Emery Grunert, John Giles, Richard Gordon, Richard C. Gordon, Fred Gallagher, Charley Giles, Everett Gordon, Rolland D. Giles, Jim Hutchison, Frank Compton, Don Cross, Bill K. Dunaway, Kimble Foor, Archie Hicks, Gary G. Hicks, Warren Nohren, Lola & Raymond Pfeiffer, Lyle & Audrey West, Jim J. Hutchison, Jim Hutchison, George Hundertpfund, Cecil Hutton, Paul Jones, Florence B. Jones, Florence Jones, Ralph Jones, Harold R. Kennell, Jr., Hazel Kessler, Donald Kessler, Glen L. Kessler, Emory Knox, L. C. Lieb, George E. Miller, George Miller, Irene Patrick, Earl V. Reeder, Earl Reeder, Charles Reid, Verl Steele, James Vonderheide, Titus Vogel, Gene A. Wiley, Joe & Richard Waldhoff Virgil, Wayne Walden, Carol Young, Horace Doty, Edna Ferrell, Glenn I. Ferrell, Glenn Ferrell, T. D. Hennigh, Jr., McClovia Hilligoss, Harry Leeds, J. E. Neal, Jackie Owens, LaVerne Storm, Frank Warren, James L. Fribley, Kenneth Carroll, Bill Dunaway, Henry Endsley, Aloysius Seitz, Dean Woods, Mrs. Ned Adams, J. T. Allen, Wayne & Frances Allen, Frances M. Allen, Harley T. Beyers, Wilfred C. Beyers, Jr., Wilfred J. Beyers, Wilhemina Beyers, Raymond Bond, Carolyn Chamberlain, Joyce Chamberlain, Marion R. Chamberlain, Ralph Chamberlain, Kenneth Dickey, Cletus J. Eck, James Eck, William J. Elliott, Frank Epley, Mary Epley, Myrna Flesch, Kenneth J. Flesch, Kenneth Flesch, Andrew Flesch, Roger R. Fry, R. Edman Greenfield, R. E. Greenfield, Milton & Roselle Hahnenkamp, Herman Hanneken, John Holliday, John T. Holliday, Anna J. Kinney, Raymond C. Marley, Virgil J. Nold, Leona & Vergil J. Nold, John Pollman, Robert M. Pollman, Agnes Rakers, Elizabeth Raker, William Suey, Fredrick E. Suey, David Suey, Clarence J. Schmitz, James and Betty Smith, Vincent Sommer, Charles H. Temmen, Frank Temmen, James C. Temmen, James Temmen, Richard B. Temmen, Paul F. Temmen, Paul Temmen, Claude Temmen, Claude B. Temmen, Claude B. & Martha Temmen, John Van Uytven, Charles Vits, Joe Wolf, Juanita Kuhn Wolf, Juanita K. Wolf, John S. Wood, John Wood, Ina Adkins, Henry Bales, Emma Beals, John H. Bigler, Mrs.

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[1] *continued*

Ross Boldt, Clarence Bushur, Donald Bushur, Gerald & Marla Bushur, Louis Greuel, Leonard Greuel, Dorothy Gentry, A. W. Hanfland, Hanfland Lumber Co., Albert Hoene, Anna Hoene, Clarence Hoene, Clarence & Frances Hoene, Della Hoene, James Hoene, John & Ruth Hoene, John Hoene, Ruth Hoene, Richard Hoene, Joseph A. Hoene, Paul Kaufman, Christine Koelsch, George Konrad, Richard Meyer, Christine Niebrugge, Tony Pike, Ambrose Probst, George Probst, James Probst, Paul Probst, Harold Schumacher, Norbert Schumacher, Francis Sudkamp, Sudkamp Brothers, Louis J. Schutte, John H. Schutte, Eileen Schutte, Bertha Schutte, Clara Schutte, Dolores Steinwandtner, Albert Schumacher, B. J. Schumacher, John Schumacher, Sudkamp Brothers, Max Van Sant, Charles Walk, Maurice Walk, Robert Walk, Edwin Warner, Donald Wendt, Gertrude Wendt, Allie Wesselman, Robert Willenborg, Richard Zerrusen, Garold Brunken, William Brunken, Grace Fribley, E. E. Killam, Ora M. Kerr, Leola M. Potter, Eugenia Smith, Evelyn J. Weber, Evelyn J. & J. Arthur Weber, Estate, Marion Waddington, Oscar Eades, Raymond F. Foor, Raymond & Marjorie Foor, Rudolph & Alda Foor, Rudolph Foor, Jeffery L. & Mary K. Foor, Gregory A. & Barbara S. Foor, Kimble Foor, O. R. Glick, Eugene Hunter, Harold Hunter, Noel Hunter, Louis Halbrook, Lloyd W. Koons, Harry A. Jones, Harold Hunter, Junior H. L. Lilly, Lemuel & Wreatha Lilly, Wreatha Goldie Lilly, Mamie & Edmund Marxman, Edwin F. Mathias, Jr., F. W. Miller, Mrs. Linnett Mize, Harold L. Prosser, George L. Rueff, Eugene W. Schmitz, Lester J. Schmitz, Oliver Shallenberger, Herman Smart, L. R. Sommer, James E. Vits, Hattie Wakefield, Lyle and Audrey West, Dean Whitlatch, Charles Blaase, Roscoe Blackerby, Reid Buchanan, Ross Buchanan, Marion R. Chamberlain, Ralph L. Chamberlain, Wesley Chamberlain, Mabel Chamberlain, Ross Chamberlain, Helen Elberson, Roy Fagg, Halden Frailey, Leland Green, Naomi Harrison, Chester D. Horn, Earl Horsman, Mason Horsman, William & Goldie M. Horsman, George H. Romine, L. R. Sommer, Carl A. Turner, Fred E. Turner, Harry Turner, Harry G. Turner, C. L. Voudrie, V. M. Winter, Anne Hoene, Clarence Hoene, Merlyn Richards, Robert Walk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RUSSELL G. SCHLENZ and NANCY A. SCHLENZ,
Lake County, Illinois Appellants,

and

GERTRUDE ANDERSON and 1300 CONSOLIDATED CASES,
Shelby County, Illinois Appellants,

v.

JOHN W. CASTLE, ROBERT JASPER, THE LAKE COUNTY, ILLINOIS, BOARD OF REVIEW, SHELBY COUNTY, ILLINOIS and the ILLINOIS PROPERTY TAX APPEAL BOARD,
Appellees.

On Appeal From The Supreme Court Of Illinois

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (App. A, *infra*, pp. A-1 to A-14) is reported at 84 Ill. 2d 196, 417 N.E. 2d 1336 (1981). The court denied rehearing without opinion. (App. B, *infra*, p. A-14). The court reversed, in relevant part, the decisions of two Illinois Appellate Courts. The Appellate Court opinions are reported at 80 Ill. App. 3d 1131, 400 N.E. 2d 753 (2d

Dist. 1980) (App. C, *infra*, pp. A-15 to A-19) and 81 Ill. App. 3d 327, 401 N.E. 2d 290 (5th Dist. 1980) (App. D, *infra*, pp. A-20 to A-28).

The Second District opinion reversed in part an order of the Circuit Court of Lake County denying plaintiffs' motion for Summary Judgment (App. E, *infra*, at pp. A-29 to A-30).

STATEMENT OF JURISDICTIONAL GROUNDS

(i)

Nature Of The Proceeding

This is an appeal from a final judgment of the Supreme Court of Illinois upholding Illinois Revised Statutes, Ch. 120, par. 799.1 (1980) against challenges that the statute is invalid because it is repugnant to the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court, in upholding the statute, reversed the decisions of two Illinois Appellate Courts which had previously held the statute void, one court holding that the statute stripped the present appellants of vested rights.

(ii)

Date Of Judgment And Appeal

The Supreme Court of Illinois filed its opinion on February 20, 1981, and denied a Petition for Rehearing

filed by the present appellants, Schlenz, on March 27, 1981.

Appellants filed their notice of appeal in the Supreme Court of Illinois by mail on May 18, 1981. (App. E, *infra* at pp. A-39 to A-40).

(iii)

Statute Conferring Jurisdiction

This court has jurisdiction of the present appeal pursuant to 28 U.S.C. Sec. 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

ILLINOIS REVISED STATUTES

Statute Challenged

Ch. 120, par. 799.1 (Revenue Act of 1939, § 318.1) (1978)

799.1. Validation Of Assessments Notwithstanding Untimely Publication

§ 318.1. In all cases where real or personal property has been assessed for the purpose of taxation during the year 1978 and all years prior thereto as provided in the "Revenue Act of 1939", filed May 17, 1939, as amended,[1] except no timely publication of the assessment of real or personal property, or both, was made as provided by Section 103 of said "Revenue Act of 1939",[2] such assessments of real or personal property, or both, are hereby validated for all purposes of taxation notwithstanding that the publication of the assessments of real or personal property, or both, was not made within the time provided by statute. The extension of taxes on such real or personal property assessments, or both, are made legal and valid for the purposes of collection of taxes notwithstanding that the publication of the assessments of real or personal property, or both, was made within the time provided by statute.

Added by P.A. 80-1471, § 1, eff. Nov. 30, 1978.

[1] Paragraph 482 *et seq.* of this chapter.

[2] Paragraph 584 of this chapter.

Publication Of Assessment Lists

Ch. 120, par. 584 (Revenue Act § 103) (Appendix F, pp. A-31 to A-32).

Assessments

Ch. 120, paras. 524, 527 (Revenue Act §§ 43, 46) (Appendix F, pp. A-32 to A-35).

Property Tax Appeal Board

Ch. 120, paras. 592.1 to 592.5
(Revenue Act §§ 111.1 to 111.5)
(Appendix F, pp. A-35 to A-38).

STATEMENT OF THE CASE

On January 27, 1978, the Supreme Court of Illinois filed its opinion in the unrelated case of *Andrews v. Foxworthy*, 72 Ill. 2d 13, 373 N.E. 2d 1332, holding that late publication of a non-quadrennial real property tax assessment[2] voids an increase in that year's assessments. The court was affirming a prior Appellate Court decision in 43 Ill. App. 3d 438, 357 N.E. 2d 678 (5th Dist. 1976). The taxpayers in *Andrews* subsequently received refunds. *Neubert v. Foxworthy*, 71 Ill. App. 3d 438, 389 N.E. 2d 898 (5th Dist. 1979).

The Illinois legislature responded to *Foxworthy* by enacting Public Act 80-1471 which added Ill. Rev. Stat., Ch. 120, par. 799.1 to the Illinois Revenue Act of 1939, effective November 30, 1978. The paragraph purported to validate retrospectively assessments made in 1978 and years prior thereto despite late publication of the assessment.

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[2] Real property in Illinois is assessed quadrennially but assessments are sometimes increased in non-quadrennial years. See Ill. Rev. Stat., Ch. 120, paras. 524, 527, 584 (1977).

The constitutionality of Ch. 120, par. 799.1 is the subject matter of the present litigation.

A. Lake County Taxpayers

Russel and Nancy Schlenz filed this action in the Circuit Court of Lake County in March, 1978, naming among the defendants Robert Jasper, Supervisor of Lake County Assessments and The Lake County Board of Review. Plaintiffs alleged, *inter alia*, that Lake County assessing officials had failed to publish the 1977 tax year assessment lists (except in one township) until after December 15, 1977, the final publication date mandated by Ill. Rev. Stat., Ch. 120, par. 584 (1977). Plaintiffs subsequently filed a Motion for partial summary judgment to abate the 1977 real property assessment increases on the grounds that the increases were void under the authority of *Andrews v. Foxworthy*.

On December 19, 1978, the trial court judge denied Schlenz's motion for summary judgment. He also certified to the Appellate Court pursuant to Illinois Supreme Court Rule 308 the following question,[3] *inter alia*:

> "Whether or not Senate Bill 1790, 80 General Assembly, constitutionally validates all 1977 Lake County assessments tardily published in a new Paragraph 799.1 Ch. 120, Ill. Rev. Stat., 1977, as amended?"

(See App. E, at A-30).

The Appellate Court for the Second District reversed in part and remanded, saying:

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[3] The Rule provides for interlocutory appeal of certified questions. It is analogous to 28 U.S.C. Sec. 1292(b).

"In *Andrews v. Foxworthy* (1978), 71 Ill. 2d 13, 373 N.E.2d 1332, the supreme court analyzed and interpreted the notice provisions of section 103 and held that improper publication renders a nonquadrennial reassessment void; the court therein clearly held that the statutory notice prescribed was mandatory. Consequently, in this case, the application of *Andrews* renders the reassessments here void because of noncompliance with the publication (notice) provision.

In response to this contention, defendant points out that subsequent to the *Andrews* decision, the legislature enacted Public Act 80-1471, (Ill. Rev. Stat., 1978 Supp., ch. 120, par. 799.1) which became effective on November 30, 1978, purporting to specifically validate reassessments of real property made without proper notice in all nonquadrennial years prior to and including 1978. Plaintiffs and *amici curiae* (Commonwealth Edison and certain parties litigating a similar issue in DuPage County) attack the validity of Public Act 80-1471 on the following basis: (1) it attempts to cure a void proceeding; (2) it violates the unformity of taxation provision in the Illinois Constitution; (3) it violates equal protection; (4) it violates due process; (5) it violates the "one subject" provision of the Illinois Constitution; and (6) it offends the concept of separation of powers. Only consideration of basis (1) and (6) above is necessary for our decision as we find Public Act 80-1471 unconstitutional."

80 Ill. App. 3d 1131, 1134.

Amicus Commonwealth Edison had raised State and Federal Equal Protection questions and the DuPage County *Amici* had raised State and Federal Due Process and Equal Protection clauses before the Appellate Court.

The Supreme Court of Illinois granted the Lake County defendants' Petition for Leave to Appeal.

B. Shelby County Taxpayers

On August 17, 1978, the Illinois Property Tax Appeal Board,[4] following *Andrews*, invalidated approximately 1300 assessment increases made in 1976 in a case which the protests had been consolidated before the Board for hearing. The Board found that the County Supervisor of Assessments had failed to make timely publication of the increases.

The County sought Administrative Review[5] in the Circuit Court of Shelby County which reversed on the basis of the new statute, Ill. Rev. Stat. Ch. 120, par. 799.1, which had become effective subsequent to the Board's order.

The Property Tax Appeal Board, represented by the Attorney General of Illinois, appealed on behalf of itself and the taxpayers. The Appellate Court for the Fifth District reversed, one Justice dissenting, holding that the legislative act "violates the principle of separation of powers embodied in . . . the Illinois Constitution." The majority then furtner held:

> In *Andrews* the court made it clear that the failure to comply with a mandatory requirement of publication is not merely the neglect of some legal formality. Thus, we conclude that *Andrews'* construction of the publication requirement as designed for the benefit and protection of the taxpayer—giving him an opportunity to ascertain the correctness of his assessment as compared with that of other taxpayers—gives the taxpayer in the case at bar a legal exemption from the invalid assessment increases in a nonquadrennial year. Such is more

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[4] An Administrative Appellate Board established pursuant to Ill. Rev. Stat., Ch. 120, paras. 592.1 *et seq.* (1977).

[5] Pursuant to Ill. Rev. Stat., Ch. 120, para. 592.4 (1977).

> than a mere expectation based upon an anticipated continuance of the existing law, as contended by appellee, but amounts to a vested right arising from a final decision of the Illinois Supreme Court. We further hold that the Attorney General has standing to raise the vested rights theory in this appeal. *People ex rel. Scott v. Illinois Racing Board* (1973), 54 Ill. 2d 569, 301 N.E.2d 285; *Environmental Protection Agency v. Pollution Control Board* (1977), 69 Ill. 2d 394, 372 N.E.2d 50.

81 Ill. App. 3d 327, 331.

The Supreme Court of Illinois granted Shelby County's Petition for Leave to Appeal, and consolidated the Lake County and Shelby County appeals.

In the proceedings in the Supreme Court of Illinois, the appellees and *amici* raised federal Due Process and Equal Protection questions in defending the Appellate Court decisions. The Supreme Court rejected the claims that Public Act 80-1471 violated Due Process under the Fourteenth Amendment by divesting the appellee taxpayers of vested rights. The court declined to consider the Equal Protection issues.

The Schlenz's sought a rehearing on the basis of *Washington National Arena Limited Partnership v. Treasurer, Prince George's County*, 410 A. 2d 1060 (Md. 1980). They contended that *Washington National* which relied upon this court's decision in *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922), showed that the Illinois court should have held that Public Act 80-1471 was offensive to federal Due Process under the vested rights theory.

The Supreme Court of Illinois summarily denied a rehearing.

THE FEDERAL QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION FOR THEIR RESOLUTION

I.

ILLINOIS VIOLATED APPELLANT TAXPAYERS' FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS BY OBLITERATING THEIR VESTED RIGHTS TO TAX ABATEMENTS AND REFUNDS AS ESTABLISHED BY STATE COURTS FOLLOWING THIS COURT'S *FORBES BOAT LINE* AND *ETTOR* DECISIONS.

This court should grant plenary review because the decision of the Supreme Court of Illinois is counter to a substantial line of decisions by this court and several state courts holding that the Due Process Clause protects the right to obtain a refund of a wrongfully levied tax from abrogation by a legislature. That right and similar rights have been deemed vested and protected from legislative abrogation in *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338, 339-340 (1922), *Ettor v. City of Tacoma*, 228 U.S. 148, 155-156 (1913), *Washington National Arena Limited Partnership v. Treasurer, Prince George's County*, 410 A. 2d 1060, 1064-1070 (Md. 1980) *cert. denied* ___ U.S. ___, 66 L. Ed. 2d 40 (1980), and *Stone v. McKay Plumbing*, 30 So. 2d 91, 94-95 (Miss. 1974); see also *Gibson v. Commonwealth*, 415 A. 2d 80 (Pa. 1980) and *Cipriano v. Personnel Appeal Board*, 330 A. 2d 71 (R.I. 1975); and see also Justice Linde's historical summary relating to retrospective legislation in *Hall v. Northwest Outward Bound Schools*, 572 P.2d 1007, 1009-1011 (Ore. 1977); but see *Welch v. Henry*, 305 U.S. 134, 146-149 (1938), and *People ex rel. Eitel v. Lindheimer*, 371 Ill. 367, 21 N.E. 2d 318,

appeal d'm'd *sub nom. Illinois ex rel. Eitel v. Toman*, 308 U.S. 505 (1939).

In January 1978, the Supreme Court of Illinois had affirmed in *Andrews* on state grounds that the late publication of a nonquadrennial year assessment voids any assessment increases made in that year. State and federal due process were neither raised nor considered. In August, 1978, the Illinois Property Tax Appeal Board voided the 1976 assessment increases in Shelby County, relying upon *Andrews*. The Shelby County taxpayers were entitled to immediate refunds under Illinois Revised Statutes, Ch. 120, para. 592.4 (1978). The Appellate Court held at 81 Ill. App. 3d 327, 331 that the taxpayers' rights to refunds had vested, both before and after the Tax Appeal Board's decision.

The Schlenz's filed their action in Lake County in March, 1978 and sought abatement of taxes based upon assessment increases made in 1977. It was uncontested in the courts below that the Lake County assessment officials, except in one subordinate jurisdiction, had failed to make timely publication of the 1977 assessments.

The challenged statute, Public Act 80-1471, became effective on November 30, 1978. It purported to validate retrospectively, but not prospectively, non-quadrennial assessments for which timely notice had not been given.

The Appellate Courts struck the statute on state constitutional grounds, holding that the legislative overruling of *Andrews* was an improper assumption of judicial power.

The Supreme Court of Illinois, reversing, disposed of the Schlenz's and the Appellate Court's reliance upon the Fourteenth Amendment Due Process protection of vested rights, saying:

> "A taxpayer has no vested right in the continued existence of a taxing statute".

Forbes, Ettor, Washington National Arena, and *McKay Plumbing,* as applied to the present appellants, are unmistakably contrary to the Illinois Court's opinion. These cases hold that a legislature cannot consistently with the Fourteenth Amendment Due Process retrospectively cure a tax official's action that, at the time it was made, was clearly violative of the legislative intent. As Judge Eldridge of the Court of Appeals of Maryland wrote:

> "In *Forbes,* the defect in authority was in no sense 'technical' but related to the legislative policy determination of what, if anything, should be charged by the government. The fact that the Legislature later expressed a different intent, and by 'curative act' language attempted to indicate that its new position had been the policy all along, did not convert the change in policy to a ratification of a 'technical' defect."

Washington National Arena at 1067.

Washington National Arena, specifically brought to the Supreme Court of Illinois' attention in Schlenz's Petition For Rehearing, is factually close to the present case. Certain Maryland taxpayers obtained a court ordered refund when the Maryland Tax Court determined that Prince George's County was levying recordation taxes in excess of the rate permitted by the legislature. The legislature, in 1976, purportedly "ratified, confirmed and validated" the prior overcharges as stated in the Opinion at 1072. The Maryland appellants were refused refunds for overcharges prior to 1976 by the Tax Court because of the curative act. The Court of Appeals held the statute violative of Fourteenth Amendment Due Process, relying upon this court's opinion in *Forbes.*

McKay Plumbing is also closely in point. Appellee had received a lower court judgment entitling it to a refund of sales taxes illegally levied upon services. See the prior opinion of the same court at 26 So. 2d 349 (Miss. 1946). While the case was on appeal the legislature reduced the limitation time from six years to three and imposed additional conditions for a refund. The Supreme Court of Mississippi affirmed the lower court judgment, holding that the lower court judgment was a vested right that could not, under the Due Process Clause, be obliterated by the legislature.

The Mississippi court relied upon this court's holding in *Ettor*, where the legislature had "attempted to take away from Ettor the right to recover damage he had previously sustained." 30 So. 2d 91, 94. The prevailing opinion in *McKay Plumbing* went on to say:

> "The Court, in reversing both the trial court and the Supreme Court of the State of Washington, speaking through Mr. Justice Lurton, used this language:
>
> "The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,—a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation." That case goes beyond the facts of the case at bar. There, the act was passed before the judgment was obtained. Here, the judgment was obtained

> before the act was passed. We limit our holding to the facts of this case."

Id.

The Shelby County taxpayers fit snugly into the *McKay Plumbing* fact pattern. They, like the Mississippi taxpayer, had received a judgment from a lower tribunal, the Illinois Property Tax Appeal Board. That judgment was correct at the time it was made and "can not be defeated by subsequent legislation." *Ettor* at 156, cited in *McKay Plumbing* at 30 So. 2d 91, 94.

All of the taxpayers before this court also fit within the fact pattern of *Washington National Arena* where the court said, at 1069:

> "Turning to the case at bar, we do not believe it can be meaningfully distinguished from *Forbes* . . . . ."

The Illinois legislature had limited non-quadrennial assessment increases to years in which timely notice by publication is made; the Maryland legislature had limited the recordation tax rate in certain counties to $1.10. Each limitation had been held to be mandatory by the respective state's highest court. Taxpayers in each state were then entitled to refunds. Each legislature then sought to "ratify" by "curative" legislation, the unlawful acts of the county officials. "Consequently, the retroactive application of [the curative legislation] . . . would impair property rights in violation of the United States Constitution . . . ." *Washington National Arena* at 1070.

This court should therefore exercise its plenary jurisdiction holding that *Forbes*, *Ettor*, *Washington National Arena*, and *McKay Plumbing* correctly construe the Fourteenth Amendment as applied to the present fact pattern, and reverse.

II.

ILLINOIS VIOLATED APPELLANT TAXPAYERS' FOURTEENTH AMENDMENT RIGHTS TO EQUAL PROTECTION BY BARRING THEM FROM ABATEMENT OR REFUND OF TAXES LEVIED UPON ILLEGALLY INCREASED ASSESSMENTS SOLELY BECAUSE THEY HAD NOT OBTAINED FINAL JUDGMENT PRIOR TO AN ARBITRARY STATUTORY DATE ALTHOUGH SIMILARLY SITUATED TAXPAYERS OBTAINED FUNDS.

This court should also grant plenary review because as DuPage County *amici* pointed out in the Appellate Court, 2d District, and in the Supreme Court of Illinois, the curative act as applied was repugnant to the Equal Protection Clause of the Fourteenth Amendment. The Appellate Court reversed on state grounds without reaching the federal issues. The Supreme Court of Illinois reversed the Appellate Court, and declined to consider the Equal Protection issue. That court should have found the statute impermissibly arbitrary in its application because it set up a classification devoid of any reasonable basis and therefore violative of the Equal Protection Clause as construed in *Hartford Co. v. Harrison*, 301 U.S. 459, 462 (1937), *Schlesinger v. Wisconsin*, 270 U.S. 230, 240 (1926), and *Weissinger v. Boswell*, 330 F. Supp. 615, 621-622 (M.D. Ala. 1971) (three judge court); and see *Trimble v. Gordon*, 430 U.S. 762, 766-767 (1977).

Lake County, Shelby County, Vermilion County (the county involved in *Andrews*), and possibly other taxpayers all became eligible for tax refunds when *Andrews* became final in early 1978. In each case the county tax assessing officials had made non-quadrennial assessment increases without giving timely notice by publication.

The Vermilion County taxpayers received their refunds "in full", as stated in the court's opinion in *Neubert v. Foxworthy*, 71 Ill. App. 3d 438, 438, (decided after the present case was on appeal).

The Lake and Shelby County taxpayers sought their relief, respectively, in the Circuit Court of Lake County and before the Property Tax Appeal Board. The Shelby County taxpayers obtained judgment from the Board.

Then, on November 30, 1978, Public Act 80-1471 became law and purportedly deprived taxpayers of any remedy for the refusal of taxing authorities to follow the mandates of the Revenue Act.

The Lake and Shelby County taxpayers were barred from any remedy by the new act. Four hundred and eight Vermilion County taxpayers, indistinguishably situated, had received their relief and were unaffected. See 71 Ill. 2d 13, 16.

Public Act 80-1471 drew an arbitrary boundary line creating two groups of taxpayers among those who had suffered assessment increases without timely publication prior to 1978. The boundary line separated those who had received final judgments for abatements or refunds prior to November 30, 1978 and those who had not.

The Shelby County taxpayers lost their refunds solely because the county chose to appeal the Property Tax Appeal Board's decision. Shelby County was thereby able to defer finality of judgment until legislative rescue arrived.

Public Act 80-1471 is repugnant to appellants' Equal Protection right to be free of arbitrary legislative classifications and arbitrary differences in taxation. "This Court requires, at a minimum, that a statutory classifi-

cation bear some rational relationship to a legitimate state purpose." *Trimble* at 766. It is now settled law that a "'wholly arbitrary' . . . . classification would be in plain conflict with the Fourteenth Amendment." *Schlesinger* at 240 (gifts made within six years of death conclusively presumed made in contemplation of death). An attempted classification must rest upon a "difference which bears a reasonable and just relation to the act to which the classification is proposed". *Hartford Co.* at 462 (resident agent license unavailable to salaried non-mutual insurance company employee). "[D]ifferences in taxation resulting from the failure of state officers to properly administer the state's tax laws will offend the Due Process and Equal Protection clauses of the Fourteenth Amendment." *Weissinger* at 622.

The Lake, Shelby and Vermilion County taxpayers were all entitled to tax refunds by the Supreme Court of Illinois' *Andrews* decision. Public Act 80-1471 effectively classified the Vermilion County taxpayers differently from the Lake and Shelby County taxpayers. The purpose of the classification was simply to overrule an unpleasant court decision protecting taxpayers from unlawful acts of their assessment officials. The classification was therefore wholly arbitrary as that term is understood in Equal Protection analysis.

The legislative classification imposed by Public Act 80-1471 arbitrarily deprived appellants of property rights by depriving them of a remedy to which they were entitled under Illinois tax statutes.

This court should therefore exercise its plenary jurisdiction, hold that the Public Act 80-1471 offends the Equal Protection clause, and reverse the judgment of the Supreme Court of Illinois.

CONCLUSION

This court should find that the present appeal presents substantial federal questions because the Supreme Court of Illinois decision is counter to the weight of substantial existing constitutional authority. The opinion of the court below in fact rested upon no prior opinion of this court in adjudicating appellants federal constitutional claims. This court should therefore exercise its plenary jurisdiction and reverse in order to reaffirm the Federal Constitutional limitations upon a State's power to administer its tax laws.

Respectfully submitted,

PAUL E. HAMER
Attorney of Record
1356 Shermer Road
Northbrook, Illinois 60062
(312) 272-1800

JACK L. URETSKY
135 S. LaSalle Street
Chicago, Illinois 60603
(312) 372-7842

Attorneys for Appellants

APPENDIX A

Opinion of the Supreme Court of Illinois
(Filed February 20, 1981)

Docket Nos. 53189, 53286 cons.—Agenda 44—September 1980.

RUSSELL G. SCHLENZ *et al.*, Appellees, v. JOHN W. CASTLE, Director of Local Government Affairs, *et al.* (Robert Jasper, Supervisor of Assessments, *et al.*, Appellants).—THE COUNTY OF SHELBY, Appellant, v. THE PROPERTY TAX APPEAL BOARD, Appellee.

MR. CHIEF JUSTICE GOLDENHERSH delivered the opinion of the court:

These consolidated cases present the question of the validity of section 318.1 of the Revenue Act of 1939 (Ill. Rev. Stat. 1979, ch. 120, par. 799.1). In cause No. 53189 plaintiffs filed an application for leave to appeal from the order of the circuit court of Lake County entered pursuant to Rule 308(a) (73 Ill. 2d R. 308(a)). The appellate court allowed leave to appeal, reversed the order in part, affirmed it in part (80 Ill. App. 3d 1131), and we allowed plaintiffs' petition for leave to appeal. In cause No. 53286 the defendant Property Tax Appeal Board appealed from the judgment of the circuit court of Shelby County entered in the action brought by the County of Shelby for administrative review of the Property Tax Appeal Board's decision holding certain assessments invalid. The appellate court reversed (81 Ill. App. 3d 327), and we allowed the County's petition for leave to appeal. The causes were ordered consolidated for argument and opinion.

Cause No. 53189 is another in a series of actions involving the alleged failure of the appropriate officials to equalize real property assessments in this State. See, *e.g., Hamer v. Kirk* (1978), 57 Ill. App. 3d 335; *Hamer v. Kirk* (1976), 65 Ill. 2d 211; *Hamer v. Kirk* (1976), 64 Ill. 2d 434; *Hamer v. Lehnhausen* (1975), 60 Ill. 2d 400; *Hamer v. Mahin* (1973), 13 Ill. App. 3d 51; *Hamer v. Mahin* (1970), 47 Ill. 2d 252; *People ex rel. Hamer v. Jones* (1968), 39 Ill. 2d 360.

In their two-count first amended complaint filed in the circuit court of Lake County, plaintiffs Russell G. Schlenz and Nancy A. Schlenz named as defendants the Director of the Department of Local Government Affairs, the supervisor of assessments of Lake County, the Lake County board of review and certain Lake County township assessors. In count I plaintiffs, purporting to act as representatives of a class, sought, *inter alia*, an order declaring that a specified procedure utilizing "sales ratio studies" for assessment and equalization of realty be made applicable statewide for 1977 and subsequent tax years. Plaintiffs also sought an order declaring that the defendants must comply with applicable provisions of the Revenue Act of 1939 (Ill. Rev. Stat. 1979, ch. 120, par. 482 *et seq.*) for 1977 and subsequent tax years. In count II plaintiffs sought injunctive relief to enforce the declarations prayed in count I of the complaint.

A "Supplemental Complaint" was filed "attacking the method of distributing state grants-in-aid" (see *Hamer v. Dixon* (1978), 61 Ill. App. 3d 30), and the first amended complaint was further amended seeking to challenge the tax-exempt status of certain property in Lake County.

Citing *Andrews v. Foxworthy* (1978), 71 Ill. 2d 13, plaintiffs filed a motion for partial summary judgment alleging that "there is no genuine issue as to any material fact relative to the failure of the defendants *** to publish

the real estate assessment lists for the 1977 tax year in Lake County until after December 15, 1977, except in Shields Township." Plaintiffs also moved for a determination of their class as consisting of "all persons or entities owning improved real property used for single family residential purposes subject to taxation in the State of Illinois for the 1977 tax year and subsequent tax years." Defendants filed a motion to deny, and an "objection to the motion" for determination of the class. The circuit court denied plaintiffs' motion for partial summary judgment and allowed defendants' motion and objection opposing the class certification. Pursuant to Supreme Court Rule 308(a) (73 Ill. 2d R. 308(a)) the circuit court certified the issues of the propriety of a class action and the constitutionality of the statute.

The appellate court affirmed that portion of the order which denied class certification, held that section 318.1 was unconstitutional as an attempt to validate a void tax and as violative of the principle of the separation of powers (see Ill. Const. 1970, art. II, sec. 1), and remanded the cause for a determination of the existence of a subclass. 80 Ill. App. 3d 1131, 1133-35; see Ill. Rev. Stat. 1979, ch. 110, par. 57.3(b).

In cause No. 53286, the record shows that appropriate officials in Shelby County began a complete reassessment of real estate for tax purposes for the 1976 nonquadrennial tax year. Although the statute provided that it must be published by July 10, 1976, the supervisor of assessments did not publish the list of changes of assessment until December 7, 1976. In addition to the publication, individual notices of assessment changes were mailed. Thereafter, over 3,500 complaints were filed by taxpayers with the Shelby County board of review challenging the increased assessments. After the board of review entered its decisions in the cases, many of the taxpayers appealed

to the Property Tax Appeal Board (see Ill. Rev. Stat. 1975, ch. 120, par. 592.1), which, after hearing, entered its order holding the assessments invalid. On administrative review the circuit court reversed the findings of the Board, noting in part that section 318.1 was "a validating act making legal and effective all assessments *** irrespective of a failure to make a timely publication." On appeal, the appellate court reversed, finding "that the purporting validating statute at issue here likewise seeks to overrule retroactively the decision of the Supreme Court in *Andrews*" and that "Once the court had explicated the mandatory nature of timely publication in *Andrews*, the explication became, in effect, a part of the statute until the General Assembly changed it." *County of Shelby v. Illinois Property Tax Appeal Board* (1980), 81 Ill. App. 3d 327, 329-30; see: *Roth v. Yackley* (1979), 77 Ill. 2d 423.

We consider first the question whether in cause No. 53189 the appellate court erred in affirming the circuit court's denial of certification of a class. The plaintiffs contend that because of the failure to equalize property according to law "the [Director of Local Government Affairs] had to place a higher equalization factor on [Lake County] in order to bring the aggregate assessments up to a statutory level." As a result, they argue, the allegations concerning inter-county equalization were sufficient to "maintain the action as a class action on a state-wide basis." Furthermore, plaintiffs contend that this case is not a "friendly or collusive suit," that they do not "have interests which are antagonistic to the remainder of the class," and that even assuming so, "the problem can be resolved by the creation of sub-classes with respect to a particular issue." In response, it is contended by the defendants supervisor of assessments and board of review that, since this case involves a "total inability" to proceed as a class action, the appellate court's order of remandment "appears to serve no purpose."

Section 57.2 of the Civil Practice Act provides, in part, that a class action may be maintained if the court finds that there are questions of law or fact common to the class which predominate over those affecting only individual members, that the representative parties will fairly and adequately protect the interest of the class, and that the class action is an appropriate method for the fair and efficient adjudication of the controversy. (Ill. Rev. Stat. 1979, ch. 110, par. 57.2.) This court has held that the question whether to certify a purported class is a matter within the sound discretion of the circuit court, and will be reversed only upon a showing of a clear abuse of discretion or the application of impermissible legal criteria. *McCabe v. Burgess* (1979), 75 Ill. 2d 457, 464; see also *Califano v. Yamasaki* (1979), 442 U.S. 682, 702-03, 61 L. Ed. 2d 176, 193, 99 S. Ct. 2545, 2558.

In denying class certification, the circuit court found that except for the fact that the alleged class was numerous the requirements of section 57.2 were lacking. The court noted in ruling on the question whether the plaintiffs were adequate class representatives that plaintiff Nancy Schlenz had at one time been Mr. Hamer's (plaintiffs' counsel) secretary; "that she has not read the pleadings filed in this case"; "that also she has very little knowledge about the tax assessment and collection procedures in the State of Illinois"; and that "it's apparent that the real party in interest, the real instigator of the lawsuit, is Mr. Hamer, and that the naming of Mr. and Mrs. Schlenz as class representatives is just a mode of convenience and a bit of subterfuge." See *Hamer v. Board of Education* (1977), 52 Ill. App. 3d 531, 537.

While Hamer is not a named plaintiff in this case, the record shows the type of relationship between the class representatives and the attorney which calls into question the adequacy of plaintiffs' representation of the purported

class. Class certification has frequently been denied because of the personal or business relationships between named class representatives and nonplaintiff class attorneys. (*Barliant v. Follett Corp.* (1978), 74 Ill. 2d 226; *Frank v. Teachers Insurance & Annuity Association of America* (1978), 71 Ill. 2d 583; *Susman v. Lincoln American Corp.* (7th Cir. 1977), 561 F.2d 86; *Charal v. Andes* (E.D. Pa. 1979), 81 F.R.D. 99; compare *Sweet v. Bermingham* (S.D.N.Y. 1975), 65 F.R.D. 551.) We conclude that the circuit court did not abuse its discretion in determining that the plaintiffs were inadequate class representatives in this case and in refusing to certify the purported class.

We find no error in the decision of the appellate court to remand the cause for a determination of whether a subclass may be found to exist. The record shows that only incidental reference was made and consideration given by the parties and the circuit court to the question of the existence of a subclass. (See Ill. Rev. Stat. 1979, ch. 110, par. 57.3(b); *Steinberg v. Chicago Medical School* (1977), 69 Ill. 2d 320, 342.) We have also considered the other contentions of the parties with respect to the issue of class certification and find them to be without merit.

We consider next the question of the validity of section 318.1 of the Revenue Act of 1939. (Ill. Rev. Stat. 1979, ch. 120, par. 799.1.) Cause No. 53286 involves the validity of 1976 assessments in Shelby County and cause No. 53189 involves the validity of assessments in Lake County for the 1977 tax year.

Section 103 of the Revenue Act of 1939, as amended and effective for the tax years 1976 and 1977, provided that the supervisor of assessments "shall publish *** a list of real estate for which assessments have been added or changed since the last preceding assessment, together with the amounts of the assessments on such real estate."

(Ill. Rev. Stat. 1975, ch. 120, par. 584.) The publication in cause No. 53286 was required on or before July 10, 1976, while publication in cause No. 53189 was required on or before December 15, 1977. (Ill. Rev. Stat. 1975, ch. 120, par. 584.) It is undisputed that in both instances the publication was later than the statutory dates. In *Andrews v. Foxworthy* (1978), 71 Ill. 2d 13, we held that the publication dates in section 103 of the Revenue Act were mandatory and that failure of timely publication is not an "informality or clerical error" within the savings provisions of section 235 of the Revenue Act of 1939, as amended. (Ill. Rev. Stat. 1977, ch. 120, par. 716; 71 Ill. 2d 13, 23-24.) Thereafter, and before either circuit court judgment was entered in these cases, the General Assembly enacted section 318.1, providing:

> "In all cases where real or personal property has been assessed for the purpose of taxation during the year 1978 and all years prior thereto as provided in the 'Revenue Act of 1939', filed May 17, 1939, as amended, except no timely publication of the assessment of real or personal property, or both, was made as provided by Section 103 of said 'Revenue Act of 1939', such assessments of real or personal property, or both, are hereby validated for all purposes of taxation notwithstanding that the publication of the assessments of real or personal property, or both, was not made within the time provided by statute. The extension of taxes on such real or personal property assessments, or both, are made legal and valid for the purposes of collection of taxes notwithstanding that the publication of the assessments of real or personal property, or both, was not made within the time provided by statute." Ill. Rev. Stat. 1979, ch. 120, par. 799.1.

Relying principally upon *People v. Holmstrom* (1956), 8 Ill. 2d 401, the appellants contend that the appellate court erred in holding the statute unconstitutional. The appellees contend that the statute violates the principle of separation of powers. *Amici curiae* contend that the

statute is void because it deprives the objectors of equal protection of the laws, deprives them of property without due process of law, and that the Act in which section 318.1 was contained (Public Act 80—1471) is void because "it is not confined to one subject."

The holdings of the appellate court that section 318.1 violates the principle of separation of powers are based on that court's interpretation of our opinion in *Roth v. Yackley* (1979), 77 Ill. 2d 423. *Roth* involved an amendment to section 10 of the Cannabis Control Act (Ill. Rev. Stat., 1978 Supp., ch. 56½, par. 710) and section 410 of the Illinois Controlled Substances Act. (Ill. Rev. Stat., 1978 Supp., ch. 56½, par. 1410, effective June 30, 1978.) This court had held in *People v. DuMontelle* (1978), 71 Ill. 2d 157, that fines and costs were not reasonable terms and conditions of probation as that term was used in section 10 of the Cannabis Control Act, and that the imposition of fines and costs was therefore not authorized by statute. The amendments authorized the imposition of fines and costs as conditions of probation and further provided:

> "The General Assembly declares that the changes made by this amendatory Act *** are declaratory of existing law and are therefore applicable in relation to events which occurred before the effective date of this amendatory Act. The 'terms and conditions' of probation as specified in this amendatory Act are declared to be reasonable terms and conditions for probation under the affected Sections as those Sections were in effect before the effective date of this amendatory Act." Pub. Act 80—1202, sec. 3, eff. June 30, 1978.

The statute involved in *Roth* is clearly distinguishable from that here involved. The General Assembly did not amend section 103 of the Revenue Act, and section 318.1 does not attempt to attribute to section 103 at the time of our opinion in *Andrews*, a meaning different from that declared in that opinion.

This court has previously considered the question of separation of powers in circumstances similar to those here. In *Worley v. Idleman* (1918), 285 Ill. 214, an election was held to authorize a tax levy and the issuance of bonds for road construction in Douglas County. The election was ruled invalid because of defects in the ballot. (*People ex rel Duncan v. Worley* (1913), 260 Ill. 536.) Subsequently, legislation was enacted providing a method for ratification of the bonds. The ratification was completed and certain taxpayers who had been defendants in the prior case sought to enjoin a planned exchange of bonds. In affirming the validity of the curative statute the court noted:

> "The objection most frequently urged in cases similar to the one at bar, and one which appellants in effect here make, is, that by the curative act the legislature has invaded the constitutional province of the judiciary and has attempted to set aside the force and effect of the judgments and decrees of the courts ***. The judgment of this court and the decrees of the circuit court upon which appellants rely were not final adjudications that the bonds *** did not constitute a legal indebtedness *** for the reason that the bondholders were not parties to any of the suits in which the question of the validity of those bonds arose. Until an adjudication had been made in a suit between the town and the bondholders declaring that the bonds were not valid, the legislature had the right and power, as between the town and the bondholders, to validate those bonds ***." 285 Ill. 214, 220-21.

A similar conclusion was reached in *Steger v. Traveling Men's Building & Loan Association* (1904), 208 Ill. 236, where this court rejected a separation of powers challenge to a validating statute authorizing acknowledgments of

trust deeds which were invalid when executed. The court said: "That is not an exercise of judicial power, since it does not purport to settle suits or controversies, but only gives effect to acknowledgments in a matter under the legislative control." 208 Ill. 236, 242.

The rationale of these cases is applicable here, and we hold that the General Assembly has not usurped judicial authority by directing a construction to be placed on section 103 contrary to our decision in *Andrews*.

We find no merit in appellees' contentions that by the decision in *Andrews* they acquired a vested right of which section 318.1 deprives them without due process. A taxpayer has no vested right in the continued existence of a taxing statute. *In re Application of Skidmore* (1979), 75 Ill. 2d 33; *People ex rel. Harding v. Chicago & Northwestern Ry. Co.* (1930), 340 Ill. 102; *People ex rel. Campe v. Board of Review* (1919), 290 Ill. 467.

In *People v. Holmstrom* (1956), 8 Ill. 2d 401, this court considered a curative statute almost identical to the act at issue. In that case, in an action in debt to recover delinquent personal property taxes for several years in which publication of assessment lists was tardy under section 103, the defendant contended that he had been denied due process. The validating act provided that all the assessments and levies "are validated for all purposes of taxation notwithstanding that the publication of the assessments was not made as provided by statute." (8 Ill. 2d 401, 404.) The taxpayer argued that the validating act itself was void and "that the General Assembly has power to validate by curative act only in the case of irregular or defective exercise of authority and that it cannot, in such manner, make a void proceeding valid." This court upheld the constitutionality of the validating act, noting that "the legislature has the power to pass an act curing a defect in a tax levy when the defect consists of the

failure to observe some requirement of the law without which the legislature might have authorized the levy to be made." 8 Ill. 2d 401, 404-05.

In view of our conclusion that the statute did not violate the principle of separation of powers it is not necessary to further consider the argument of the appellees and *amici* that the court in *Holmstrom* had no occasion to consider the question of separation of powers and that it is therefore distinguishable.

Citing *People ex rel. Ward v. Chicago & Eastern Illinois Ry. Co.* (1936), 365 Ill. 202, *People ex rel. Lord v. Wabash Ry. Co.* (1924), 311 Ill. 579, and *People ex rel. Stevenson v. Illinois Central R.R. Co.* (1923), 310 Ill. 212, *amicus* argues that although the General Assembly "may, by statute, validate the irregular or defective exercise of power where the proceeding sought to be cured was not one of the fundamentals of the powers exercised," it may not "validate acts which are wholly void." Those cases are clearly distinguishable in that in each of them the curative statute purported to validate actions taken without the statutory power to do so. The distinction is best illustrated by the language in *North Pier Terminal Co. v. Tully* (1976), 62 Ill. 2d 540, 548, "The defects of which the plaintiffs complain are essentially procedural irregularities in the assessment process which *** do not establish the lack of authority of the assessor to act." (See, *e.g., Central Illinois Public Service Co. v. Swartz* (1918), 284 Ill. 108.) Here there was no lack of power to make the assessments, and the rationale of *Holmstrom* is clearly applicable.

Although the issue was raised for the first time in the *amicus* briefs, we consider it appropriate to review the question whether Public Act 80–1471 violates article IV, section 8, of the Illinois Constitution in that it is not confined to one subject. (*People ex rel. Peoria Civic Center Authority v. Vonachen* (1975), 62 Ill. 2d 179.) *Amicus*

argues that because Public Act 80–1471, in addition to amending section 103 of the Revenue Act of 1939, added sections 19.23–1(a) and amended the exemption provisions of paragraph 500.23.1, the Act deals with more than one subject. We do not agree. The Act amended is the "Revenue Act of 1939," and we find apposite the language in *People ex rel. Carey v. Board of Education* (1973), 55 Ill. 2d 533, when in considering a similar argument directed toward amendments to the School Code this court said:

> "This argument overlooks the nature of the act which was being amended. The School Code of 1961, like its predecessor, was designed to gather into one statute the provisions relating to the establishment, operation and maintenance of schools. The complete title of the 1961 Act is: 'An Act in relation to the establishment, operation and maintenance of public schools, providing for the transportation of and scholarships in institutions of higher learning for students of all schools, and to repeal certain acts herein named'. Like its predecessor, its short title is 'The School Code'. Ill. Rev. Stat. 1959, 1971, ch. 122, par. 1–1.
>
> Amendments to statutes of this kind, including the School Code, have frequently been before the court. (See, *People v. Deatherage* (1948), 401 Ill. 25, 43; *Co-ordinated Transport, Inc. of Illinois v. Barrett* (1952), 412 Ill. 321; *City of Evanston v. Wazau* (1936), 364 Ill. 198.) As we stated in *Sangamon County Fair and Agricultural Ass'n v. Stanard* (1956), 9 Ill. 2d 267, 272-3: 'When the title of the act amended is set forth in the title of the amendatory act, as was here done, any provision which might have been inserted in the original act may be incorporated in the amenda-

> tory act.' Provisions concerning 'parental schools' were included in the School Code before its amendment (see Ill. Rev. Stat. 1971, ch. 122, par. 34—117) and they did not become 'discordant' or 'incongruous' because they were included in this amendatory act. *Cf. People ex rel. Gutknecht v. City of Chicago* (1953), 414 Ill. 600." 55 Ill. 2d 533, 536-37.

In their brief plaintiffs Schlenz argue several issues which are not presented in their interlocutory appeal, and the briefs of *amici* attempt to raise several issues which are not appropriately considered on this record. We do not therefore further consider them.

For the reasons stated, the judgment in cause No. 53189 is reversed insofar as it holds invalid the real estate assessments because of failure to give timely notice and is affirmed insofar as it remands the cause to the circuit court of Lake County to determine whether an appropriate subclass of plaintiffs can be shown to exist. The judgment of the appellate court in cause No. 53286 is reversed, and the judgment of the circuit court is affirmed.

53189 — Affirmed in part and reversed in part and remanded.
53286 — Appellate court reversed; circuit court affirmed.

MR. JUSTICE SIMON took no part in the consideration or decision of this case.

APPENDIX B

Order of the Supreme Court of Illinois Denying Rehearing (Dated March 27, 1981)

Mr. Jack L. Uretsky
Attorney at Law
135 S. LaSalle St., S#900
Chicago, IL 60603

Nos. 53189, 53286 Cons.—Russell G. Schlenz, et al., etc., appellees, vs. John W. Castle, as Director of the Department of Local Government Affairs of the State of Illinois, et al., etc., (Robert Jasper, as Supervisor of Assessments of Lake County, et al., etc., appellants). Appeal, Appellate Court, Second District.

The Supreme Court today denied the petition for rehearing in the above entitled cause. Mr. Justice Simon took no part.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX C

Opinion of the Appellate Court of Illinois
(Filed February 7, 1980)

RUSSELL G. SCHLENZ *et al.*, Plaintiffs-Appellants, *v.* JOHN W. CASTLE *et al.*, Defendants-Appellees.

Second District No. 78-586

Affirmed in part, and reversed in part and remanded.

Mr. JUSTICE WOODWARD delivered the opinion of the court:

On October 2, 1979, we filed our original opinion in this cause; on October 4, 1979, the supreme court announced its decision in *Roth v. Yackley* (1979), 77 Ill. 2d 423, 396 N.E.2d 520, which we discuss later; on October 19, 1979, plaintiffs filed a petition for rehearing; on November 19, 1979, we granted rehearing, but the defendants thereafter did not file an answer to the petition as allowed by Supreme Court Rule 367(d) (Ill. Rev. Stat. 1977, ch. 110A, par. 367(d)). Having considered the arguments raised by plaintiffs on rehearing, we have withdrawn our original opinion and replaced it with this modified opinion.

This is an interlocutory appeal from an order denying plaintiffs' motion for a class determination and motion for partial summary judgment. The issues raised are: (1) whether class certification was properly denied; (2) whether the trial court erred by denying plaintiffs leave to substitute new counsel or new class nominees; (3) whether Public Act 80-1471 is valid; and (4) whether the trial court erred by refusing to stay the proceedings.

As to the first issue, plaintiffs seek certification of a class comprised of themselves and all other owners of single-family residential property in Illinois. They allege that the various defendants have, in a variety of ways, been in noncompliance with statutes regarding the assessment and equalization of real estate taxes with the

result that there is a disparity in assessment between plaintiffs and owners of other types of real estate.

On December 19, 1978, the trial court made a number of oral findings regarding the requirements of class certification set forth in section 57.2 of the Civil Practice Act (Ill. Rev. Stat. 1977, ch. 110, par. 57.2). The requirements are:

> "Prerequisites for the maintenance of a class action.
>
> (a) An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:
>
> (1) The class is so numerous that joinder of all members is impracticable.
>
> (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
>
> (3) The representative parties will fairly and adequately protect the interest of the class.
>
> (4) The class action is an appropriate method of the fair and efficient adjudication of the controversy."

First, the trial court found that because there were probably "millions" of potential plaintiffs, the numerosity requirement was met, and we agree. Second, the court found that questions requiring individual proof predominated over any common questions of fact or law, noting that even if the named plaintiffs proved improper assessment as to their property, that would not establish in other proposed class members a right to recover (see *Goetz v. Village of Hoffman Estates* (1978), 62 Ill. App. 3d 233, 378 N.E.2d 1276), because each other plaintiff would have to prove that the township assessor improperly assessed the property in his township. The court therefore properly concluded that the second requirement was not met. Third, the court found that the named plaintiffs knew essentially nothing about the suit and had simply told the attorney to do whatever he thought

necessary. The turning over of complete control to the attorney in a class action has been cited as unacceptable because the attorney then becomes the de facto representative of the class, and this should be viewed as a conflict of interest. (*In re Goldchip Funding Co.* (M.D. Pa. 1974), 61 F. R. D. 592.) That the attorney for a class may not also be the class representative is now a per se rule in Illinois. (*Barliant v. Follett Corp.* (1978), 74 Ill. 2d 226, 384 N.E.2d 316.) The third requirement was accordingly not met. Fourth, the trial court noted that because of the multiplicity of disparate and unrelated factual and legal questions involved, the fourth requirement was not met.

The prerequisites of section 57.2 of the Civil Practice Act must be established by the proponents of the class action. (*McCabe v. Burgess* (1979), 75 Ill. 2d 457, 389 N.E.2d 565.) *McCabe* also established that the standard of review in Illinois regarding the trial court's determination of whether the requirements for a class action have been met is a determination of whether the trial court abused its discretion. Based on the record before us, we determine that the trial court's findings that, as to the proposed class, the last three of the prerequisites were not met and did not constitute an abuse of discretion. It is possible that plaintiffs may be able to show that a subclass exists (Ill. Rev. Stat. 1977, ch. 110, par. 57.3(b); *Steinberg v. Chicago Medical School* (1977, 69 Ill. 2d 320, 371 N.E.2d 634) and on remand the trial court should, within its discretion, determine whether or not such a subclass can be shown.

The second issue involved the trial court's refusal to allow a substitution of class representatives or a substitution of attorneys for the class. Based in our holding above, that the trial court correctly ruled that the proposed class should not be certified, that a class action could not be maintained as alleged, and based on the reasoning of *Goldchip* and *Barliant*, we determine that if, on remand, the trial court should find that there is a subclass to certify, there should be either a substitution of attorneys or of class representatives. *Barliant.*

The third issue raised by plaintiffs is noncompliance with the notice requirements of section 103 of the Revenue Act (Ill. Rev. Stat. 1977, ch. 120, par. 584), which provided that the assessor shall publish notice of assessment changes on or before December 15 of the tax year; timely notice as required by section 103 was not given in the present case which involved increases in assessments for the general real estate taxes levied for 1977 (a nonquadrennial year). In *Andrews v. Foxworthy* (1978), 71 Ill. 2d 13, 373 N.E.2d 1332, the supreme court analyzed and interpreted the notice provisions of section 103 and held that improper publication renders a nonquadrennial reassessment void; the court therein clearly held that the statutory notice prescribed was mandatory. Consequently, in this case, the application of *Andrews* renders the reassessments here void because of noncompliance with the publication (notice) provision.

In response to this contention, defendant points out that subsequent to the *Andrews* decision, the legislature enacted Public Act 80-1471, (Ill. Rev. Stat., 1978 Supp., ch. 120, par. 799.1) which became effective on November 30, 1978, purporting to specifically validate reassessments of real property made without proper notice in all nonquadrennial years prior to and including 1978. Plaintiffs and *amici curiae* (Commonwealth Edison and certain parties litigating a similar issue in Du Page County) attack the validity of Public Act 80-1471 on the following basis: (1) it attempts to cure a void proceeding; (2) it violates the uniformity of taxation provision in the Illinois Constitution; (3) it violates equal protection; (4) it violates due process; (5) it violates the "one subject" provision of the Illinois Constitution; and (6) it offends the concept of separation of powers. Only consideration of basis (1) and (6) above is necessary for our decision as we find Public Act 80-1471 unconstitutional.

Curative acts are within the power of the legislature (*People ex rel. Toman v. Mercil & Sons Co.* (1941), 378 Ill. 142, 37 N.E.2d 839); further, the legislature may amend an act after a construction by the courts and the amendment constitutes a more recent expression of

legislative intent and establishes a new rule. (*In re Estate of Zimmerman* (1978), 63 Ill. App. 3d 560, 380 N.E.2d 434.) However, the recent case of *Roth v. Yackley* (1979), 77 Ill. 2d 423, 396 N.E.2d 520, carefully distinguishes between amendatory statutes which operate prospectively and are therefore acceptable and amendatory statutes which attempt to operate retroactively in contravention of an interpretation announced by a court of a prior statute and which is therefore improper. As the supreme court stated in *Roth*:

> "The General Assembly's declaration that the amendatory act applies to events which occurred before the effective date of the amendatory statute represents a legislative attempt to retroactively apply new statutory language and to thereby annul a prior decision of this court. This is an assumption by the General Assembly of the role of a court of last resort in contravention of the principle of separation of powers embodied in article II, section 1, of the Illinois Constitution of 1970, which provides: 'The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.'" (77 Ill. 2d 423, 428-29.)

We accordingly conclude that Public Act 80-1471 violates the principle of separation of powers insofar as it attempts to validate real estate assessments made without proper notice for all nonquadrennial years prior to and including 1978 and because it seeks to nullify a prior decision of our supreme court which clearly interpreted the law as it existed prior to November 30, 1978.

Finally, plaintiffs contend that it was error to not stay the proceedings pending appeal. The staying of proceedings is within the discretion of the trial court, and, considering the ability of the named plaintiffs to continue the presentation of their cause as individuals, and the fact that any other possible plaintiffs also could have filed separate actions or separate tax objections, thereby avoiding prejudice, we hold that there was no abuse of discretion in denying the stay.

Affirmed in part, reversed in part, and remanded.

NASH, J., concurs.

APPENDIX D

[Filed February 25, 1980]

No. 79-135
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

COUNTY OF SHELBY, STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

STATE OF ILLINOIS PROPERTY TAX APPEAL BOARD,
Defendant-Appellant,

and

GERTRUDE ANDERSON,
Taxpayer-Defendant.

Appeal from the Circuit Court of Shelby County.
Honorable **Daniel H. Dailey**, *Judge Presiding.*

Mrs. JUSTICE SPOMER delivered the opinion of the court:

On August 17, 1978, relying on the recent opinion of the Illinois Supreme Court in *Andrews v. Foxworthy* (1978), 71 Ill.2d 13, 373 N.E.2d 1332, the Property Tax Appeal Board[1] ruled in numerous consolidated cases

[1] An administrative agency within the Illinois Department of Local Government Affairs. See Ill. Rev. Stat. 1977, ch. 120, par. 502.1 *et seq.*

arising out of Shelby County, including the instant case, that increases in real estate assessments for 1976 were invalid because of the failure of the county supervisor of assessments to make timely publication of the intended changes as required by statute. On administrative review, the Circuit Court of Shelby County found that a statute passed by the General Assembly subsequent to the Supreme Court's opinion in *Andrews* had validated the increased assessments, and therefore reversed the decision of the Board. This appeal followed.

At appellant's request we take judicial notice in the cases on appeal of the pleadings and papers filed with the circuit court but assigned only to case number 78-MR-13, all involving common questions of fact and law. The Illinois Supreme Court in *People v. Davis* (1976), 65 Ill.2d 157, 161, 357 N.E.2d 792, 794, stated that "taking judicial notice of matters of record in other cases in the same court is simply an application of the increasingly recognized principle that matters susceptible of judicial notice include facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy," and we find this principle applicable to the present case.

The determinative issue before us is whether the purported validating statute violates the principle of separation of powers embodied in Section 1 of Article II of the Illinois Constitution. We find that it does, and is therefore void.

It is undisputed that the supervisor of assessments failed to publish increases in assessments made in a non-quadrennial year by July 10, 1976, as required by Section 103 of the Revenue Act of 1939. (Ill. Rev. Stat. 1975, ch. 120, par. 584). In the *Andrews* case, the Supreme Court held that the requirements of Section 103 are mandatory, and that a tax resulting from an increase in assessment was invalid because timely publication in compliance with the statute had not been made.

What complicates the instant case is the passage by the General Assembly of P.A. 80-1471, effective No-

vember 30, 1978—after the decision of the Property Tax Appeal Board, but prior to the decision of the trial court, which was handed down on January 23, 1979. The statute provides in pertinent part as follows:

> "In all cases where real or personal property has been assessed for the purpose of taxation during the year 1978 and all years prior thereto as provided in the 'Revenue Act of 1939', filed May 17, 1939, as amended, except no timely publication of the assessment of real or personal property, or both, was made as provided by Section 103 of said 'Revenue Act of 1939', such assessments of real or personal property, or both, are hereby validated for all purposes of taxation notwithstanding that the publication of the assessments of real or personal property, or both, was not made within the time provided by statute. The extension of taxes on such real or personal property assessments, or both, are made legal and valid for the purposes of collection of taxes notwithstanding that the publication of the assessments of real or personal property, or both, was not made within the time provided by statute." (Ill.Ann.Stat., ch. 120, par. 799.1 (Smith-Hurd 1979).)

The appellee contends here that this retroactive, validating, or curative act "is merely the legislature acting to ratify or conform an act which it might lawfully have authorized in the first instance where the defect arises out of the neglect of some legal formality." Relying on *People v. Holmstrom* (1956), 8 Ill.2d 401, 134 N.E.2d 246, the appellee argues that because the legislature might have lawfully and constitutionally authorized a change in assessed values without any publication at all, it may waive timely publication without contravening the doctrine of separation of powers.

We think, however, that the result here is dictated by the recent decision of the Supreme Court in *Roth v. Yackley* (1979), 77 Ill.2d 423, 396 N.E.2d 520, 33 Ill. Dec. 131. In *Roth*, the court was confronted with a situa-

tion where the 80th General Assembly passed an amendatory act in response to a prior decision of the Supreme Court which had construed the meaning of the language used in section 10 of the Illinois Cannabis Control Act (Ill.Rev.Stat., ch, 56½, par. 710) (*People v. DuMontelle* (1978), 71 Ill.2d 157, 374 N.E.2d 205). The amendatory act amended section 10 and section 410 of the Controlled Substances Act (Ill.Rev.Stat., ch. 56½, par. 1410), and purported to be declaratory of the existing law prior to its passage and to be applicable to events before its effective date. In rejecting the contention that the amendatory act nullified the effect of its previous decision, the Supreme Court stated:

> "The General Assembly's declaration that the amendatory act applies to events which occurred before the effective date of the amendatory statute represents a legislative attempt to retroactively apply new statutory language and to thereby annul a prior decision of this court. This is an assumption by the General Assembly of the role of a court of last resort in contravention of the principle of separation of powers embodied in article II, section 1 of the Illinois Constitution of 1970, which provides: 'The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.' (See *Federal Express Corp. v. Skelton* (1979), 265 Ark. 187, 199, 578 S.W.2d 1, 7-8; *Johnson v. Morris* (1976), 87 Wash.2d 922, 926, 557 P.2d 1299, 1303; 1A Sutherland, Statutes and Statutory Construction sec. 27.04 (4th ed. 1972).) While the General Assembly has the power to draft legislation and to amend statutes prospectively if it believes that a judicial interpretation was at odds with its intent (see *Bruni v. Department of Registration and Education* (1974), 59 Ill.2d 6, 12, 319 N.E.2d 37; *Mitchell v. Mahin* (1972), 51 Ill.2d 452, 456, 283 N.E.2d 465), it is the function of the judiciary to determine what the law is and to apply statutes to cases. (See *People v. Nicholls* (1978), 71 Ill.2d 166,

179, 15 Ill.Dec. 759, 374 N.E.2d 194; *Belfield v. Coop* (1956), 8 Ill.2d 293, 307, 134 N.E.2d 249.) The cases cited by the State do not recognize that the General Assembly may retroactively overrule a decision of a reviewing court. Instead they recognize only the power of the legislature to establish laws prospectively and to alter for future cases interpretations of statutes by reviewing courts. See *Modern Dairy Co. v. Department of Revenue* (1952), 413 Ill. 55, 66, 108 N.E.2d 8; *State v. Bowman* (1962), 116 Ohio App. 285, 286-87, 187 N.E.2d 627, 629; *cf. People ex rel. Spitzer v. County of La Salle* (1960), 20 Ill.2d 18, 28, 169 N.E.2d 521." (77 Ill.2d at 425, 396 N.E.2d at 522, 33 Ill.Dec. at 133.)

The court also noted on page 133 that "[i]t is logically difficult to perceive how the declaration and the amendments by the 80th General Assembly can be simply a clarification of the intent of the 77th General Assembly, which originally enacted the statute seven years earlier, since only a fraction of the individuals who comprised the General Assembly were the same at both times."

Prior to the decision in *Roth*, the same issue was raised, and the same amendatory act was involved in the case of *People v. Harris* (3d Dist. 1979), 69 Ill.App.3d 118, 387 N.E.2d 33. The court there held that the legislative amendments enacted after the *DuMontelle* decision were violative of the constitutional provision for the separation of powers in attempting retroactively to direct construction of the previously enacted sections and to reverse the construction placed upon them by the Illinois Supreme Court.

We think it clear that the purported validating statute at issue here likewise seeks to overrule retroactively the decision of the Supreme Court in *Andrews*. Once the court had explicated the mandatory nature of timely publication in *Andrews*, that explication became, in effect, a part of the statute until the General Assembly changed it. (*Roth v. Yackley*, 77 Ill.2d at 425, 396 N.E.2d

at 522, 33 Ill.Dec. at 133, and cases cited therein.) No subsequent action of the legislature could constitutionally alter the effect mandated by the court's interpretation as to past failures to make timely publication. Although in our opinion the decision in *Andrews* was not mandated by the case of *People v. Jennings* (1954), 3 Ill.2d 125, 119 N.E.2d 781 because a distinction can well be made between late publication with no prejudice to the taxpayer as contrasted with a total failure to publish. *Andrews* is nonetheless the law in Illinois, and binds this court in the case at bar. To the extent that the *Holstrom* case and other cases cited by the appellee are inconsistent with the result we reach here, we conclude that they have been effectively overruled by *Roth* and *Andrews*. In *Andrews* the court made it clear that the failure to comply with a mandatory requirement of publication is not merely the neglect of some legal formality. Thus, we conclude that *Andrews'* construction of the publication requirement as designed for the benefit and protection of the taxpayer—giving him an opportunity to ascertain the correctness of his assessment as compared with that of other taxpayers—gives the taxpayer in the case at bar a legal exemption from the invalid assessment increases in a nonquadrennial year. Such is more than a mere expectation based upon an anticipated continuance of the existing law, as contended by appellee, but amounts to a vested right arising from a final decision of the Illinois Supreme Court. We further hold that the Attorney General has standing to raise the vested rights theory in this appeal. (*People ex rel. Scott v. Illinois Racing Board* (1973), 54 Ill.2d 569, 301 N.E.2d 285; *E.P.A. v. Pollution Control Board* (1977), 69 Ill.2d 394, 372 N.E.2d 50.)

We therefore conclude that the Property Tax Appeal Board was correct in holding that the 1976 assessment increases in Shelby County were void because of the failure of the supervisor of assessments to make timely publication. The order of the Circuit Court of Shelby County is reversed, and the decision of the Property Tax Appeal Board is affirmed.

REVERSED.

JONES, P. J., concurs.

KARNS, J., dissenting.

These numerous cases arise from a general, non-quadrennial reassessment of all real property in Shelby County, approximately 21,000 parcels, mandated by the Department of Local Government Affairs in order to equalize property assessments in Shelby County at the statutorily required percentages of fair market value. The reappraisal work was performed in 1975 and 1976. The Department of Local Government Affairs had issued an opinion to the Shelby County authorities that the July 10 publication date was directory, not mandatory. *Andrews v. Foxworthy*, (1978), 71 Ill. 2d 13, 373 N.E.2d 1332, was pending in the trial court in Vermilion County when changes in assessment were published in Shelby County on December 7, 1976. The reassessments had not been completed by the July 10 statutory date. Property owners were also mailed notice of any change in assessment. The Board of Review of Shelby County remained in session as its term was extended by the Department of Local Government Affairs, and approximately 3,500 complaints were filed and hearings were had before the Board. After decisions by the Board of Review, some 1,600 appeals were perfected to the Property Tax Appeal Board where 1,400 cases were consolidated and approximately 1,283 decided after the Supreme Court's decision in *Andrews v. Foxworthy.*

I do not believe that the result reached by the majority follows from the Supreme Court's decision in *Roth v. Yackley* (1979), 77 Ill. 2d 423, 396 N.E.2d 520. *Roth* dealt with an attempt by the General Assembly to alter, retroactively, the construction the Supreme Court had theretofore placed on section 10 of the Illinois Cannabis Control Act (Ill. Rev. Stat. 1973, ch. 56½, par. 710) in *People v. DuMontelle* (1978), 71 Ill. 2d 157, 374 N.E.2d 205. *Roth v. Yackley*, however, in reality dealt with an attempt by the General Assembly to increase the penalty for a crime after its commission.

The punishment for a criminal offense cannot be increased by an amendatory statutory enactment taking

effect after the offense has been committed. (*People v. Peach*, (3d Dist. 1976), 39 Ill. App. 3d 757, 350 N.E.2d 583; Ill. Rev. Stat. 1977, ch. 131, par. 4). The Supreme Court had placed a construction on the Cannabis Control Act in *DuMontelle*. Roth was entitled to the benefit of this construction of the Act. Otherwise, the General Assembly could effectively increase the punishment for a violation of the Act by presuming to direct the court as to the proper construction and interpretation of the Act as it would have accomplished by amending the Act to take effect retroactively. *Ex post facto* laws are proscribed by the Constitution of the United States and by article 1, section 16 of the Illinois Constitution of 1970. A law increasing the penalty for a crime retroactively is an *ex post facto* law. (*People v. Bowling* (3d Dist. 1976), 43 Ill. App. 3d 932, 357 N.E.2d 724; *People v. Johnson* (4th Dist. 1970), 133 Ill. App. 2d 818, 263 N.E.2d 901; *People v. Wyckoff* (2d Dist. 1969), 106 Ill. App. 2d 360, 245 N.E.2d 316).

While the Supreme Court did not discuss *ex post facto* application of criminal laws in *Roth v. Yackley*, no discussion was warranted as the amendment to the Cannabis Control Act did not purport to be a validating or curative act but a clarification of prior legislative intent. In the area of civil legislation, however, specifically those statutes dealing with property taxation, it has been uniformly held that no one has a vested right in the continuation of a particular statutory enactment so long as the effect of the legislative action does not impair the obligation of a contract. (*People v. Lindheimer* (1939), 371 Ill. 367, 21 N.E.2d 318; *People v. Mercil & Sons Co.* (1941), 378 Ill. 142, 162-163, 37 N.E.2d 839, 850).

In *Andrews v. Foxworthy* (1978), 71 Ill. 2d 13, 373 N.E.2d 1332, the Supreme Court emphasized that the publication of assessment roles or changes in a property owner's individual assessment was not required by any constitutional mandate. The passage of Public Act 80-1471, effective November 30, 1978, prior to the decision of the Circuit Court in the instant cases, simply changed the law applicable to these cases by no longer requiring

publication by July 10. Validating or curative acts have long been upheld in the area of property taxation. (See *People v. Anderson* (1961), 21 Ill. 2d 396, 172 N.E.2d 760; *People ex rel. Bauer v. Water Com.* (1960), 20 Ill. 2d 139, 169 N.E.2d 350; *People v. Holmstrom* (1956), 8 Ill. 2d 401, 134 N.E.2d 246).

The effect of the amendment to the statute was not to overrule retroactively the decision of the Supreme Court in *Andrews v. Foxworthy;* that case had been finally decided. It did change the law as it applied to similar cases between different parties that were not yet before the court. I see nothing in *Andrews* that suggests an intention to overrule *People v. Holmstrom* (1956), 8 Ill. 2d 401, 134 N.E.2d 246. In *Holmstrom*, the Supreme Court approved a validating act that cured the failure to publish assessments for 1954 and all prior years by the date required by the Revenue Act. This is precisely what the General Assembly has done here. The fact that the Supreme Court had ruled in another case between different parties when the Revenue Act required publication by July 10 seems to me of no consequence to the proper decision of these cases.

APPENDIX E

[Dated December 19, 1978]

IN THE CIRCUIT COURT OF
THE NINETEENTH JUDICIAL CIRCUIT,
LAKE COUNTY, ILLINOIS

RUSSELL G. SCHLENZ, et al., etc., et al.,
Plaintiffs-Petitioners,

GENERAL
No. 78 CH 74

v.

JOHN W. CASTLE, etc., et al.,
Defendants-Respondents.

ORDER

This cause comes on to be heard on Plaintiff's motion for partial summary judgment and on the motions of all Defendants to deny certification of the Plaintiff class, the Court having heard all arguments and having made findings of fact and law on the record in this cause, orders as follows:

1. The Plaintiff's motion for partial summary judgment is denied;

2. The motion of the Defendant Township Assessors for summary judgment on the question of class certification is granted;

3. Regarding Plaintiff's motion for class certification, the Court holds that the instant action does not present a proper class action, and certification of the alleged class is denied;

4. Plaintiff's oral motion, made this date in open court for leave to substitute within 35 days of this date, either new class representatives or new counsel is denied;

5. The Court hereby finds, pursuant to Supreme Court Rule 308 that the questions of:

a. Whether or not this case can be maintained as a proper class action, and

b. Whether or not Senate Bill 1790, 80th General Assembly, constitutionally validated all 1977 Lake County assessments tardily published in a new Paragraph 799.1, Chapter 120, Ill. Rev. Stats. 1977, as amended,

are presented in interlocutory orders one, two and three of this order which are not otherwise appealable, and the Court finds that these orders involve questions of law as to which there are substantial grounds for differences of opinion, and that an immediate appeal from these orders will materially advance the ultimate termination of this litigation;

6. On the Court's own motion pursuant to Supreme Court Rule 308(e), further proceedings before this Court are not stayed by this order.

Enter:

/s/ Charles F. Scott
Judge

DATED this 19th day of December, 1978, at Waukegan, Illinois.

APPENDIX F

STATUTES GOVERNING ILLINOIS ASSESSMENT PROCEDURES

Illinois Revised Statutes, Ch. 120 (1977, prior to October 1).

PUBLICATION OF ASSESSMENT LISTS

584. Publication in counties of less than 2,000,000—Fees.] § 103. In counties containing less than 2,000,000 inhabitants, as soon as the county assessor, supervisor of assessments or board of assessors, as the case may be, had completed the assessment in the county or in the assessment district he or it shall, in each year of a quadrennial assessment of real property, publish for such county or assessment district a full and complete list of the assessment of real and personal property, by townships if the county is so organized. In years other than years of a quadrennial assessment of real property, the assessor, supervisor of assessments or board of assessors, as the case may be, shall publish the assessment of personal property in full and a list of real estate for which assessments have been added or changed since the last preceding assessment, together with the amounts of the assessments on such real estate. Such publication shall be made on or before July 10 of that year in counties with less than 150,000 inhabitants and on or before December 15, of that year in counties with 150,000 or more but less than 2,000,000 inhabitants, and shall be printed in some public newspaper or newspapers published in the county; or shall be mailed to every person in that township, or in counties not under township organization, in that county paying taxes upon personal property. In every county containing less than 2,000,000 inhabitants, in addition to the publication of the list of assessments of real property in each year of a quadrennial assessment of real property and of the list

of real estate for which assessments have been added or changed, as provided above, a notice shall be mailed by the township assessor, county assessor, supervisor of assessments or board of assessors, as the case may be, to each taxpayer at his address as it appears on the assessor's records as to whose real property the assessment has been changed since the last preceding assessment, except in the case of changes caused by a change in the county equalization factor by the Department, during any year such change is made. Such notice must also state the name and price per copy of the newspaper in which the list of assessments will be published. In every township or assessment district in which there is published one or more newspapers of general circulation, the list of such township shall be published in one of the newspapers. The newspaper shall be entitled to a fee of $.20 per line for publishing the assessment list and shall furnish to the local assessment officers as many copies of the paper containing the assessment list as he or they may require.
Amended by P.A. 77-1721, § 1, eff. July 1, 1972; P.A. 78-449, § 1, eff. Oct. 1, 1973.

524. Assessments in quadrennial years.] § 43. In counties having the township form of government and a population of less than 1,000,000 inhabitants, the quadrennial assessment years shall be 1963 and every fourth year thereafter, unless and until changed as provided in this Section for counties having the township form of government and a population of 100,000 or more but less than 1,000,000 inhabitants. In counties having the commission form of government and a population of less than 1,000,000 inhabitants, the quadrennial assessment years shall be 1962 and every fourth year thereafter.

The county board of each county having a population of 1,000,000 inhabitants or more shall, by resolution adopted before January 1, 1960, divide the county into 4 assessment districts. If the county is organized in townships the assessment districts shall follow township

lines. The assessment district shall divide, as near as may be, the work of assessing the real estate in the county into 4 equal parts. Neither the area nor the number of parcels of real estate need be equal in the 4 assessment districts. The resolution shall number the assessment districts 1 to 4 inclusive. The quadrennial assessment years for assessment district number 1 shall be 1961, 1964 and every fourth year thereafter; for assessment district number 2 the quadrennial assessment years shall be in 1962, 1965 and every fourth year thereafter; for assessment district number 3 the quadrennial assessment years shall be 1963, 1966 and every fourth year thereafter, and for assessment district number 4 the quadrennial assessment years shall be 1963 and every fourth year thereafter. The county board of any county divided into assessment districts under this paragraph may provide by resolution of the county board for the assessment of the entire county in any year.

The county board of any township form of government with a population of 100,000 or more but less than 1,000,000 inhabitants may, by resolution adopted before January 1, 1966, divide the county into 4 assessment districts. The assessment districts shall follow township lines, and shall divide, as near as may be, the work of assessing the real estate in the county into 4 equal parts. Neither the area nor the number of parcels of real estate need be equal in the 4 assessment districts. The resolution shall number the assessment districts 1 to 4 inclusive. The quadrennial assessment years for assessment district number 1 shall be 1967, 1970 and every fourth year thereafter; for assessment district number 2 the quadrennial assessment years shall be 1968, 1971 and every fourth year thereafter; for assessment district number 3 the quadrennial assessment years shall be 1969, 1972 and every fourth year thereafter; and for assessment district number 4 the quadrennial assessment years shall be 1969 and every fourth year thereafter. The county board of any county divided into assessment districts under this paragraph may provide

by resolution for the assessment of the entire county in the quadrennial assessment year provided by law for that county and for the dissolution of the assessment districts after the first such assessment.

On or before June 1 in each quadrennial assessment year in all counties having a population less than 1,000,000 inhabitants, and as soon as he reasonably can in each quadrennial assessment year in counties having a population of 1,000,000 or more inhabitants, or if any such county is divided into assessment districts as provided above, as soon as he reasonably can in each quadrennial assessment year in such assessment districts, the assessor in person or by his deputy shall actually view and determine as near as practicable the value of each tract or lot of land listed for taxation as of January 1, or as provided in Section 27a of this Act,[1] of such year and assess the same as 33⅓% of its fair cash value, or in accordance with a county ordinance adopted pursuant to Section 4 of Article IX of the Constitution of Illinois, setting down the sum in the proper column in the books furnished him.

In making such assessments he shall set down his valuation of improved tracts and lots in one column, and his value of unimproved tracts and lots in another column. The value of lands and improvements shall be separately fixed and shall be set down in separate columns in such assessor's books.

Amended by P.A. 70-703, § 1, eff. Sept. 3, 1975.

[1] Chapter 120, § 508a.

527. Assessment changes in counties of less than 150,000—Revision of assessments in counties of less than 1,000,000—Notice.] § 46. In counties containing less than 150,000 inhabitants, the assessors or supervisors of assessments shall not in any year, except the year of the quadrennial assessment, change the valuation of any real estate or improvements or the division thereof, except as provided in this Section and in Sections 37 and 44 of this Act.[1] The supervisor of

assessments, the county assessor or the board of assessors of any county having fewer than 1,000,000 inhabitants, or the township assessor of any township in any such county, may in any year revise an assessment and correct such assessments as shall appear to him or them to be just. A notice of any such revision shall be given in the manner provided in Section 103[2] to the taxpayer as to whose property the assessment has been changed.

Amended by P.A. 77-556, § 1, eff. July 31, 1971.

PROPERTY TAX APPEAL BOARD

592.1 Creation—Membership—Chairman—Vacancies—Appeal of decision of board of review.] § 111.1. There shall be created in the Department, the Property Tax Appeal Board, consisting of 3 members appointed by the Governor, with the advice and consent of the Senate. The Governor, with the advice and consent of the Senate, shall designate one of the members as Chairman. A vacancy in the membership of the Board shall be filled in the same manner as original appointments are made.

In any county other than a county of over 1,000,000 population, any taxpayer dissatisfied with the decision of a board of review as such decision pertains to the assessment of his property for taxation purposes, or any taxing body that has an interest in the decision of the board of review on an assessment made by any local assessment officer, may, within 30 days after the date of written notice of the decision of the board of review, appeal such decision to the Property Tax Appeal Board for review. Such taxpayer or taxing body, hereinafter called the appellant, shall file a petition with the clerk of the Property Tax Appeal Board, setting forth specifically the facts upon which he bases his objection to the decision of the board of review, together with a statement of the contentions of law which he desires to raise, and the relief he requests. If a petition is filed by a taxpayer, the taxpayer is precluded from filing objec-

tions based upon valuation, as may otherwise be permitted by Sections 194, 195 and 235 of this Act.[1] However, any taxpayer not satisfied with the decision of the board of review as such decision pertains to the assessment of his property for taxation purposes, need not appeal such decision to the Property Tax Appeal Board for review before seeking relief in the courts.

Amended by P.A. 79-386, § 1, eff. Oct. 1, 1975

P.A. 79-1044, § 1, eff. Oct. 1, 1975.

592.2. Procedure—One-year assessment level

§ 111.2. The Property Tax Appeal Board shall establish by rules an informal procedure for the determination of the correct assessment of property which is the subject of an appeal. The Board may use a one-year assessment level to be based on relevant sales during the previous year. Such procedure, to the extent that the Board considers practicable, shall eliminate formal rules of pleading, practice and evidence, and except for any reasonable filing fee determined by the Board, may provide that costs shall be in the discretion of the Board. A copy of the appellant's petition shall be mailed by the clerk of the Property Tax Appeal Board to the board of review whose decision is being appealed. The chairman of the Property Tax Appeal Board shall provide for the speedy hearing of all such appeals. All appeals shall be considered de novo.

Amended by P.A. 81-894, § 1, eff. Jan. 1, 1980.

592.3 Conduct of hearings.] § 111.3. A hearing shall be granted if any party to the appeal so requests, and, upon motion of any party to the appeal or by direction of the Property Tax Appeal Board, any appeal may be set down for a hearing, with proper notice to the interested parties. Notice to all interested taxing bodies shall be deemed to have been given when served upon the State's Attorney of the county from which the appeal has been taken. Hearings may be held before less than a majority of the members of the Board, and the chairman

may assign members or hearing officers to hearings. Such hearings shall be open to the public and shall be conducted in accordance with such rules of practice and procedure as the Board may make and promulgate. The Board, any member or hearing officer may require the production of any books, records, papers or documents that may be material or relevant as evidence in any matter pending before it and necessary for the making of a just decision.

Amended by P.A. 76-689. § 1, eff. Aug. 7, 1969.

592.4 Record of proceedings and orders—Decision—Extension of taxes—Review under Administrative Review Act.] § 111.4. The Property Tax Appeal Board shall keep a record of its proceedings and orders and such record shall be a public record. The Board shall make a decision in each appeal or case heard by it, and such decision shall be based upon equity and the weight of evidence and not upon constructive fraud, and shall be binding upon appellant and officials of government. The extension of taxes on any such assessment so appealed shall not be delayed by any proceeding before the Board, and, in case the assessment is altered by the Board, any taxes extended upon such unauthorized assessment or part thereof shall be abated, or, if already paid, shall be refunded.

The decision or order of the Property Tax Appeal Board in any such appeal, shall, within 10 days thereafter, be certified to the appellant and to the proper authorities, including the board of review whose decision was appealed, the county clerk who extends taxes upon the assessment in question, and the county collector who collects property taxes upon such assessment.

Final administrative decisions of the Property Tax Appeal Board are subject to review under the provisions of the Administrative Review Act.[1]

Added by act approved May 1, 1967. L.1967, p. 372.

[1] Chapter 110, § 264 *et seq.*

592.5 Hearing officers and personnel—Clerk—Compensation.] § 111.5. The Property Tax Appeal Board may appoint necessary hearing officers, appraisers, technicians and necessary clerical help to aid it in performing its duties, and may use employees of the Property Tax Division of the Department of Revenue, when available, in performing its duties.

The Property Tax Appeal Board shall choose some person to serve as clerk of the Board, and in its discretion, may with the consent of the Director choose the Superintendent of the Property Tax Division of the Department to serve as such clerk. If the Superintendent of the Property Tax Division is chosen to serve as the clerk, he shall not receive additional compensation for such duties but may receive necessary traveling expenses.

Amended by P.A. 76-2254, § 1, eff. July 1, 1970.

APPENDIX G

[Filed May 20, 1981]

IN THE
SUPREME COURT OF ILLINOIS
Nos. 53189, 53286 (Consolidated)

RUSSEL G. SCHLENZ, et al.,

Appellees,

v.

ROBERT JASPER, Supervisor of Assessments, et al.,

Appellants,

and

COUNTY OF SHELBY,

Appellant,

v.

THE PROPERTY TAX APPEAL BOARD, et al.,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that RUSSEL G. SCHLENZ and NANCY SCHLENZ, Appellees in No. 53189, and GERTRUDE ANDERSON. et al., Appellee in No. 53286, hereby appeal to the Supreme Court of the United States from the final order of March 27, 1981, denying Schlenz's Petition for Rehearing filed March 13, 1981. and from that part of the prior Order of February 20, 1981, reversing in part the Appellate Court of Illinois, Second District, in No. 53189 and reversing the Appellate Court of Illi-

nois, Fifth District, in No. 53286. This Appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Paul E. Hamer
by . . . . . .
1356 Shermer Rd.
Northbrook, IL 60062
(312) 272-1800

/s/ Jack L. Uretsky
135 South LaSalle Street
Chicago, IL 60603
(312) 372-7842

Attorneys for Appellants to the
Supreme Court of the United States

Attorneys for Appellants to the
Supreme Court of the United States

No. 80-2164

Office-Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RUSSELL G. SCHLENZ and NANCY A. SCHLENZ,
Lake County, Illinois Appellants,

and

GERTRUDE ANDERSON and
1300 CONSOLIDATED CASES,
Shelby County, Illinois Appellants,

v.

JOHN W. CASTLE, ROBERT JASPER, THE LAKE COUNTY, ILLINOIS, BOARD OF REVIEW, SHELBY COUNTY, ILLINOIS and the ILLINOIS PROPERTY TAX APPEAL BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION TO DISMISS PURSUANT TO RULE 16

ROBERT J. MASINI
Assistant State's Attorney
Lake County State's Attorney's Office
18 North County Street
Waukegan, Illinois 60085
(312) 689-6644
FRED L. FOREMAN
State's Attorney of Lake County
18 North County Street
Waukegan, Illinois 60085
(312) 689-6644
Attorneys for Appellees, Robert Jasper and the Lake County Board of Review

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RUSSELL G. SCHLENZ and NANCY A. SCHLENZ,
Lake County, Illinois Appellants,

and

GERTRUDE ANDERSON and
1300 CONSOLIDATED CASES,
Shelby County, Illinois Appellants,

v.

JOHN W. CASTLE, ROBERT JASPER, THE LAKE COUNTY, ILLINOIS, BOARD OF REVIEW, SHELBY COUNTY, ILLINOIS and the ILLINOIS PROPERTY TAX APPEAL BOARD,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION TO DISMISS PURSUANT TO RULE 16

MOTION

Now come the Appellees, Robert G. Jasper, the Lake County, Illinois, Supervisor of Assessments, and the Lake County, Illinois, Board of Review, by their attorney Fred L. Foreman, State's Attorney of Lake County, Illinois, through his assistant, Robert J. Masini, and respectfully request this Honorable Court to dismiss the appeal of the instant action which involves the appeal of a decision of the Illinois Supreme Court on the ground that this case does not present a substantial federal question.

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES

AMENDMENT 14

Already set forth at page 3 of Appellants' Jurisdictional Statement.

ILLINOIS REVISED STATUTES

Statute Challenged

Ch. 120, par. 799.1 (Revenue Act of 1939, § 318.1) (1978)

Already set forth at page 4 of Appellants' Jurisdictional Statement.

Publication Of Assessment Lists

Ch. 120, par. 584 (Revenue Act § 103) (1977)

Already set forth at Appendix F, pages A-31 and A-32 of Appellants' Jurisdictional Statement.

Property Tax Appeal Board

Ch. 120, pars. 592.1 to 592.5 (Revenue Act §111.1 to 111.5) (1977)

Already set forth at Appendix F, pages A-35 to A-38 of Appellants' Jurisdictional Statement.

Local Board Of Review

Ch. 120, par. 589 (Revenue Act § 108) (1977)

(Appendix p. 2a)

Payment Under Protest

Ch. 120, par. 675 (Revenue Act § 194) (1977)

(Appendix p. 7a)

Tax Objections

Ch. 120, par. 716 (Revenue Act § 235) (1977)

(Appendix p. 11a)

Prior Validation Act

Ch. 120, par. 823 (1957)
repealed 1965

(Appendix p. 1a)

FACTUAL BASIS FOR THE MOTION

In January, 1978, the Illinois Supreme Court decided the unrelated case of *Andrews* v. *Foxworthy,* 72 Ill. 2d 13, 373 N. E. 2d 1332, wherein the court held that the publication dates contained in Ill. Rev. Stat., Ch. 120, par. 584 (1977) for increased real property assessments in non-quadrennial years were a mandatory requirement on local assessment officials. *Andrews* was the final adjudication of objections filed by numerous Vermillion County, Illinois taxpayers with regard to their 1974 real property assessments pursuant to the Illinois statutory scheme for contesting real property assessments[1].

The court based its holding in *Andrews* on its 1954 decision *People* v. *Jennings,* 3 Ill. 2d 125, 119 N. E. 2d 781 which involved a total failure to publish rather than tardy publication as had occurred in *Andrews.*

On November 30, 1978, Public Act 80-1471 which added Ill. Rev. Stat., Ch. 120, par 799.1 to the Illinois Revenue Act of 1939, became law. Public Act 80-1471 validated all assessments of real and personal property for purposes of taxation notwithstanding the fact that publication of the assessments was late.

In early 1955, the Illinois General Assembly had responded to the *Jennings* decision by enacting Ill. Rev. Stat., Ch. 120, par 823 (1957) repealed 1965, which validated all 1954 and earlier real and personal property assessments which had not been published. The constitutionality of the 1955 curative act was challenged and upheld in *People* v. *Holmstrom,* 8 Ill. 2d 401, 134 N. E. 2d 246 *appeal d'm'd* 352 U. S. 938 (1956).

The case at bar involves the constitutionality of the present validation legislation, Ill. Rev. Stat., Ch. 120, par. 799.1 (1978).

The Lake County plaintiffs filed their action in March of 1978. The complaint, as amended, ran on for over fifty pages

[1] Ill. Rev. Stat., Ch. 120, pars. 675 & 716 (1977).

seeking equitable and declaratory relief involving numerous matters not relevant to this proceeding. In December, 1978, some two weeks after the enactment of Public Act 80-1471, plaintiffs filed a motion for partial summary judgment based on the holding in *Andrews* that sought a refund of that part of their 1977 real property taxes attributable to tardily published assessment increases. The trial court denied that motion based on its view that Public Act 80-1471 was constitutionally valid. The appeal of that trial court decision and the legal issue regarding the constitutionality of Public Act 80-1471 are the subject of plaintiffs' present appeal to this Court.

The Shelby County case has its origins in a 1974 order sent by the State of Illinois Department of Local Government Affairs to Shelby County ordering a mass reassessment of all real estate in the county for the purpose of equalizing assessments at the statutorily mandated level. The county hired a private appraisal firm which performed its work in 1975 and 1976. By mid-1976 it became apparent to the Shelby County Supervisor of Assessments that the new assessment figures would not be available by the publication date. She requested an opinion from the Department asking whether the publication date was directory or mandatory. The Department issued an opinion that the date was directory. At that time the *Andrews* case was still pending in the trial court in Vermillion County. The Supervisor waited until the new assessments were prepared and made her 1976 assessment publication after the statutory deadline.

After the publication over 3,500 taxpayers filed complaints with the Shelby County Board of Review pursuant to Ill. Rev. Stat., Ch. 120, par. 589(4) (1977) to obtain a review of the correctness of their new assessments. An individual hearing was held in each case. Over 1,600 appeals were taken from Shelby County Board of Review decisions to the State Property Tax Appeal Board. The 1300 consolidated cases involved in the case at bar were consolidated from those appealed to the Property Tax Appeal Board.

The Property Tax Appeal Board held a mass hearing in April, 1978, after the decision in *Andrews*, and for the first time the taxpayers' attorneys presented the legal argument concerning late publication. The Property Tax Appeal Board ruled for the taxpayers on the issue of late publication. The Shelby County State's Attorney filed a complaint for administrative review of that decision in the circuit court in September, 1978. It is that lawsuit, which shortly thereafter became involved with the issue of the constitutionality of Public Act 80-1471, which is the subject of the present appeal to this Court.

In both the 1976 and 1977 tax years all taxpayers in Lake and Shelby Counties, as well as all other taxpayers throughout Illinois, had the opportunity to receive a hearing to have the correctness of their real property assessments reviewed by the local board of review regardless of whether the publication of their assessments was timely or not. Illinois law provided for a review of real property assessments by the local county board of review upon the filing of a complaint within 20 days after the publication of each township's assessments. Ill. Rev. Stat., Ch. 120, par. 589(4) (1977). This right was not affected by tardy publication because in each case the board of review remained open after the publication for the hearing of complaints.

If a property owner was dissatisfied with the decision of the local board he could appeal that decision to the State Property Tax Appeal Board, Ill. Rev. Stat., Ch. 120, pars. 592.1-592.5 (1977), as the Shelby County taxpayers did in the case at bar, or later, when the taxes became due, pay them under protest and file a tax objection. Ill. Rev. Stat., Ch. 120, pars. 675 and 716 (1977).

In the case at bar the Lake County plaintiffs did not avail themselves of their opportunity to have the correctness of their assessment reviewed through the available procedure. The Shelby County plaintiffs did seek review and after this appeal is disposed of the correctness of their 1976 assessments will still have to be reviewed by the Property Tax Appeal Board.

The Illinois Supreme Court consolidated the appeals of the Lake County and Shelby County cases because the identical legal issue was involved in both. The two cases, as consolidated, have been appealed by the plaintiffs to this Court in the present appeal.

ARGUMENT

I.

THERE HAS BEEN NO VIOLATION OF THE APPELLANT TAXPAYERS' FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS.

There is no substantial federal question presented in the case at bar. The plaintiffs' belief that such a question exists stems from their misunderstanding of this Court's *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338 (1922) and *Ettor* v. *City of Tacoma,* 228 U. S. 148 (1913) decisions and the recent Maryland Court of Appeals decision in *Washington National Arena Limited Partnership* v. *Treasurer, Prince George's County,* 410 A. 2d 1060 (Md. 1980) cert. denied ____ U. S. ____, 66 L. Ed. 2d 40 (1980). The line of cases which is controlling in the present case is *United States* v. *Heinszen & Co.,* 206 U. S. 370 (1907), *Rafferty* v. *Smith, Bell & Co. Limited,* 257 U. S. 226 (1921) and *Graham* v. *Goodcell,* 282 U. S. 409 (1931). These decisions very plainly dictate that no constitutional violation occurred in the case at bar.

Plaintiffs' contention that a vested right possessed by them were obliterated by the passage of the challenged statute, Public Act 80-1471, is supported by the totally erroneous foundation that they somehow acquired a vested right from the *Andrews* decision, a case in which they were not parties. The plaintiffs did not acquire a vested right at the time of the *Andrews* decision, but rather they obtained a mere legal expectancy.

The *Andrews* case involved a decision regarding the 1974 tax objections of certain Vermillion County taxpayers.[2] The Lake County plaintiffs have arrived at this Court via the appeal of a denial of a motion for partial summary judgment regarding

[2] The Vermillion taxpayers had filed tax objections involving their 1974 real property tax assessments pursuant to the Illinois statutory scheme Ill. Rev. Stat., Ch. 120, pars. 675 and 716 (1977).

their 1977 real property assessment filed in a multi-facted chancery case. In fact, the Lake County plaintiffs did not ever seek to have the correctness of their 1977 property assessment directly reviewed through the available administrative remedy.

The Shelby County case is here on the appeal of an administrative agency's decision regarding the legal issue of tardy publication. When this Court finally terminates the appeals process by dismissing this appeal each of the Shelby County plaintiffs will have the correctness of their individual assessments reviewed by the agency.

The foregoing illustrates the fact that none of the plaintiffs in these consolidated cases have been prejudiced or injured in any way by either the late publication of assessments or the enactment of the validation legislation. All of the assessments which were required to be published in each year in each of the counties were, in fact, published. The plaintiffs, as well as every other Illinois taxpayer, had avenues open to them at all times in each of the years to obtain a review of the correctness of their assessments no matter when the publication occurred.

It has long been the rule in the area of civil legislation, as opposed to the prohibitions against *ex post facto* laws in the criminal area, that there is no vested right in the continuation of a particular statutory enactment so long as there is no impairment of contractual obligations. *Watson* v. *Mercer,* 33 U. S. (8 Pet.) 88, 110 (1834). This principle was well-stated by the Illinois Supreme Court in *People ex rel. Eitel* v. *Lindheimer,* 371 Ill. 367, 21 N. E. 2d 318 *appeal d'm'd sub nom. Illinois ex rel. Eitel* v. *Toman,* 308 U. S. 505 (1939):

> That the legislature cannot pass a retrospective law impairing the obligation of a contract, nor deprive a citizen of a vested right, is a principle of general jurisprudence, but a right, to be within its protection, must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. *Lindheimer,* at 321.

This Court has held in situations which involve taxation matters that the suit is for the enforcement of a public right and the litigant's interest as a taxpayer is only incidental. *Hodges* v. *Snyder,* 261 U. S. 600 at 603-604 (1923); *Rafferty,* 257 U. S. at 232.

This Court has also held that where the law is changed while a case is on appeal the reviewing court must dispose of the case under the law as it then exists and not as it was when the decision was made by the lower court. *South Carolina* v. *Gaillard,* 101 U. S. 433 (1879).

In *Washington National Arena,* at pages 1065 through 1069, the Maryland Court of Appeals provides a very good discussion of the two sides of the issue involved in the case at bar. The Maryland Court started by pointing out that:

> With respect to legislation imposing taxes or other governmental charges, which is retroactive to prior years, and which purports to correct defects in the collecting authority for those prior years, the line between permissible "curative" legislation and unconstitutionally retroactive legislation has been somewhat difficult to draw. The two leading Supreme Court cases which illustrate each side of that line are *United States* v. *Heinszen,* 206 U. S. 370, 27 S. Ct. 742, 51 L. Ed. 1098 (1907), and *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338, 42 S. Ct. 325, 66 L. Ed. 647 (1922). *Washington National Arena* at 1065.

The *Forbes* and *Washington National Arena* line of cases which are mistakenly relied on by the plaintiffs deal with situations in which a legislative body attempted to retroactively change the legislative policy involved in the particular case to create the authority to impose a charge where no authority had previously existed.

In *Forbes* the Florida Supreme Court had decided that the Board of Commissioners had never been empowered to collect tolls for canal passage. The Florida Legislature then gave that power to the Commission and also attempted to ratify the

earlier collections by providing for the legalization and validation of previously collected tolls. This Court struck that part of the law pointing out that since it had been decided that no collection authority existed prior to the instant action of the Florida Legislature the authority could not be retroactively created. *Forbes,* at 339.

Likewise, in *Washington National Arena* the Maryland Legislature had only authorized a maximum recordation tax rate of $1.10 for Prince George's County and the Maryland Court of Appeals had finally construed that to be the legislative policy. When the Maryland Legislature later tried to retroactively increase that authority for Prince George's County to $1.65 the Court found that such authority could not be created retroactively. *Washington National Arena,* at 1069.

The case at bar does not involve the authority of Illinois assessment officials to assess property. That power has lawfully existed at all times relevant to this litigation and it has not been challenged. The issue in this case is similar to that in the *Heinszen* line of cases which involves a type of defect in authority which is often referred to as a "technical" defect, rather than an attempt to retroactively create authority where it had not previously existed. This case involves only the subsidiary act of timely publication of assessment lists. It is important that this Court distinguish, as it has done in the *Heinszen* line of cases and as the Illinois Supreme Court has done in this case, between those acts which although mandatory in the sense of "being required" are nevertheless, subsidiary to the exercise of the power and therefore may be retrospectively waived by the legislature, and those acts which are so fundamental to the exercise of power that retrospective waiver can not be done constitutionally. When this distinction is made it becomes readily apparent that the case at bar presents no substantial federal question.

The *Heinszen* case involved the collection of tariff duties by the United States on goods coming into the Philippines at the time immediately following the Spanish-American War. Based on several cases decided by this Court between March, 1902, and June 1906, it was held that the authority to collect the tariffs came from the President prior to the ratification of the peace treaty (April, 1899) and from Congress thereafter. However, tariffs were collected at all times even though Congress did not act to impose them until March, 1902. Consequently, although Congress possessed the power to enforce a duty at all times, there was a gap in the existence of a tariff act from April, 1899, until March, 1902.

Various suits for refunds were filed and in at least two cases which reached this Court refunds were upheld. *Lincoln* v. *United States* and *Warner B. & Co.* v. *United States,* 197 U. S. 419 (1905) *rehearing,* 202 U. S. 484 (1906). In June, 1906, one month after the *Lincoln* and *Warner B. & Co.* cases were decided Congress passed an act validating all tariffs collected during the period April, 1899, to March 1902.

The plaintiffs in the case at bar are in a situation identical to that of the *Heinszen* plaintiffs. Both sets of plaintiffs filed their actions before the passage of the validation legislation and both could point to other plaintiffs who had received relief prior to the enactment of the validation legislation.

In *Heinszen* this Court held that the challenged validation legislation was constitutional. The opinion of Mr. Justice White analogized the situation to the fundamental principle in agency law whereby a principal may retroactively ratify and validate the act of an agent, unauthorized at the time performed, but where the principal's capacity to grant the power exercised by the agent had always been in existence. *Heinszen,* at 382.

The *Heinszen* case involved several different legal arguments dealing with the ratification of the tariff duties and the effect of the validation legislation on pending lawsuits. In every instance this Court held in favor of the constitutionality of the

statute. Concerning the broad power of legislatures to validate various acts Mr. Justice White quoted from *Mattingly* v. *District of Columbia,* 97 U. S. 687 (1878), which involved the validation by Congress of certain void assessments for street improvements:

> If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and (the power) to prescribe that the assessments should be made in the manner in which they were made, it had the power to ratify the acts which it might have authorized. * * * It may therefore cure irregularities, and confirm proceeding which, without the confirmation, would be void, because unauthorized, provided such confirmation does not interfere with intervening rights. *Heinszen,* at 384 quoting from *Mattingly,* at 690.

In addressing himself to the taxpayers' arguments that they had obtained a vested right by having filed their refund suits before the enactment of the ratifying statute Mr. Justice White cited Cooley's Constitutional Limitations (7th ed. p. 543):

> Nor is it important, in any of the cases to which we have referred, that the legislative act which cures the irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suit vests in a party no right to a particular decision (citations omitted) and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered. (citations omitted). *Heinszen* at 386.

In a later case in the *Heinszen* line Mr. Chief Justice Hughes made a statement which clearly indicates that the validation statute in the present case presents no constitutional violation. The Chief Justice said:

> It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a

> curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist. *Graham* v. *Goodcell,* 282 U. S. 409 at 429.

Upon the completion of an analysis of the present situation under the law as established by the *Heinszen* line of cases it is obvious that no violation of the plaintiffs' Fourteenth Amendment Due Process rights occurred with the enactment of Public Act 80-1471. Therefore, the movants respectfully request that this Honorable Court dismiss this appeal.

II.

THERE HAS BEEN NO VIOLATION OF THE APPELLANT TAXPAYERS' FOURTEENTH AMENDMENT RIGHTS TO EQUAL PROTECTION.

There is also no substantial federal question presented in the case at bar by the plaintiffs' allegations of violations of their Fourteenth Amendment Equal Protection rights. The plaintiffs' claims that they are entitled to tax refunds after the effective date of the curative legislation simply because the *Andrews* taxpayers became entitled to refunds before the enactment of the curative act are totally meritless.

The question of the *Andrews* taxpayers' right to refunds on their 1974 taxes was finally decided by the Illinois Supreme Court in January of 1978[3], ten months before the curative legislation was enacted in November, 1978. At the time the

[3] *Neubert* v. *Foxworthy,* 71 Ill. App. 3d 438, 389 N. E. 2d 898 (4th Dist. 1979) cited by plaintiffs merely involved the unsuccessful attempt by the *Andrews* taxpayers to obtain interest on the refunds which had been finally adjudicated in January, 1978.

curative act became law the Lake County plaintiffs had not yet filed their motion for partial summary judgment with the Lake County Circuit Court and the case involving the Shelby County plaintiffs was pending before that circuit court in an administrative review action.

The fundamental problem with plaintiffs' argument is that Public Act 80-1471 does not treat similarly situated individuals in a different or discriminatory manner. They have cited no cases dealing with the question of whether the Equal Protection Clause is violated by an act of a legislature proporting to validate official acts as to which one or more non-fundamental associated functions were neglected to be performed, and we are unaware of any such cases. A legislative change will frequently result in similarly situated individuals having variant legal options, and the passage of a curative or validating act would always seem to have such an effect. It requires a strained interpretation of the Equal Protection Clause to conceptualize such "classification" as being within the purview of "equal protection". This position is firmly supported by this Court's decision in *Heinszen* which is factually indistinguishable from the case at bar.

The applicable principles in this area of the law are very familiar and have been often-times stated by this Court. In *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522 (1959) this Court said:

> The States have a very wide discretion in the laying of their taxes. * * * Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality prohibiting flexibility and variety that are appropriate to reasonable schemes of state taxation. *Allied Stores,* at 526.

In *Lehnhausen* v. *Lake Shore Auto Parts, Co.,* 410 U. S. 356 (1973) this Court said, "Where taxation is concerned and no specific federal right, apart from equal protection, is impe-

riled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen* at 359.

An equal protection argument very similar to that of the plaintiffs was rejected by the Pennsylvania courts in *Fisher Controls Co.* v. *Pennsylvania,* 354 A. 2d 920 (Pa. Comm. Ct. 1976), *aff'd,* 381 A. 2d 1253 (1977). In *Fisher Controls* the taxpayer, a Pennsylvania corporation, attacked a retroactive increase in the Pennsylvania corporate net income tax from 7% to 12%. The taxpayer argued that forcing it to pay the higher rate violated the uniformity clause of the Pennsylvania Constitution and the Equal Protection Clause of the Fourteenth Amendment since certain corporations, which had gone out of business and had received tax clearance certificates prior to the passage of the retroactive tax increase, were not subject to the additional tax.

The court rejected the equal protection claim saying:

> Retroactive provisions of a taxing statute increasing the rate of tax cannot reach a taxpayer whose tax liability was lawfully settled and paid before the enactment of the statute increasing the rate. There is no want of uniformity in not applying retroactive provisions of a tax rate increase to those it cannot reach. *Fisher Controls,* 354 A. 2d at 924.

Likewise, the alleged equal protection discrimination asserted in the instant case which is between those taxpayers whose liabilities have been settled before the enactment of Public Act 80-1471 and those whose liabilities are yet to be determined is also without merit.

Therefore, because there is no substantial federal question presented by plaintiffs' equal protection claims movants respectfully request this Honorable Court to dismiss this appeal.

CONCLUSION

The present appeal does not present any substantial federal questions for this Court's consideration. For the reasons stated in the foregoing Motion and Argument appellees request this Honorable Court to grant their Motion and dismiss the appellants' appeal of the decision of the Supreme Court of Illinois.

Respectfully submitted,

ROBERT J. MASINI
Assistant State's Attorney
Lake County State's Attorney's Office
18 North County Street
Waukegan, Illinois 60085
(312) 689-6644
FRED L. FOREMAN
State's Attorney of Lake County
18 North County Street
Waukegan, Illinois 60085
(312) 689-6644
Attorneys for Appellees, Robert Jasper and the Lake County Board of Review

APPENDIX

APPENDIX

RELEVANT ILLINOIS STATUTES

Illinois Revised Statutes, Ch. 120 (1957)

VALIDATION

AN ACT to legalize and validate tax assessments made during the year 1954 and all years prior thereto and to make legal and valid the collection of taxes based on such assessments. Approved May 21, 1955. L. 1955, p. 175.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

823. Validation of tax assessments made in 1954 and prior years and tax collections based thereon.] § 1. In all cases where real or personal property has been assessed for the purpose of taxation during the year 1954 and all years prior thereto as provided in the "Revenue Act of 1939", filed May 17, 1939,[1] as amended, except that no publication of the assessment of real or personal property, or both, was made as provided by Section 103 or 104 of said Revenue Act of 1939,[2] such assessments of real or personal property, or both, are hereby validated for all purposes of taxation notwithstanding that the publication of the assessments of real or personal property, or both, was not made as provided by statute. The extension of taxes on such real or personal property assessments, or both, are made legal and valid for the purpose of collection of taxes notwithstanding that the publication of real or personal property assessments, or both, was not made as provided by statute.

[1] Sections 482-811 of this chapter.

[2] Sections 584, 585 of this chapter.

Illinois Revised Statutes, Ch. 120 (1977)

589. Powers and duties of board of review.] § 108. In counties containing less than 1,000,000 inhabitants, the board of review shall, in any year, whether the year of the quadrennial assessment or not:

(1) Assess all property subject to assessment which shall not have been assessed by the assessor, and list and assess all property real or personal that may have been omitted in the assessment of any year or number of years, or if the tax thereon, for which such property was liable, from any cause has not been paid, or if any such property, by reason of defective description or assessment thereof, shall fail to pay taxes for any year or years, in either case the same when discovered shall be listed and assessed by the board in its revision of assessments, and the board may make such alteration in the description of real or personal property as it shall deem necessary.

(2) No such charge for tax of previous years shall be made against any property prior to the date of ownership of the person owning such property at the time the liability for such omitted tax was ascertained. Ownership as used in this Section shall be held to refer to bona fide legal and equitable titles or interests acquired for value and without notice of the tax, as may appear by deed, deed of trust, mortgage, certificate of purchase or sale or other form of contact. No such charge for tax of previous years shall be made against any real property if (a) the real property was last assessed as unimproved, (b) the owner of such property gave notice of subsequent improvements and requested a reassessment as required by Section 27a of this Act,[1] and (c) reassessment of the real property was not made within the 16 month period immediately following the receipt of that notice. Provided, that an assessment of real or personal property omitted from taxation by a decedent during his lifetime, shall be made against such property and be assessed in the name of the personal representative as executor,

[1] Chapter 120, § 508a.

administrator or trustee of such decedent's estate. The owner of real or personal property, and the executor, administrator or trustee of a decedent, whose property may have been omitted in the assessment in any year or number of years, or on which a tax for which such property was liable, has not been paid, and the several taxing bodies interested therein, shall be given at least 5 days notice in writing by the board, of the hearing on the proposed assessment of such omitted property, and the board shall have the full power to examine the owner, or the executor, administrator, trustee, legatee or heir of such decedent or other person touching the ownership, kind, character, amount and the value of such omitted property or credits.

(3) If the board shall determine that the property of any decedent was omitted from assessment during any year or number of years or that a tax for which such property was liable has not been paid, it shall be the duty of the board to give written notice to the executor, administrator or trustee of such decedent of the assessments made against such property and the amount thereof, and thereupon it shall be the duty of such executor, administrator or trustee to retain in his or their hands sufficient of the assets of such decedent's estate to pay the tax when extended on such assessment, and it shall be the duty of the county clerk to file in the circuit court, a copy of such assessment, together with the rate of taxation thereon certified by such county clerk, and upon the filing of such certificate, the court shall enter an order directing such executor, administrator or trustee to deposit with the clerk of the court or to sequester sufficient of the assets of the estate to pay the taxes on such assessments when extended as now provided by law, or to enter into bond in double the amount of such tax with securities to be approved by the court conditioned for the payment of the tax when so extended; and when so extended by the county clerk the full amount of such tax shall be a claim of the first class against such estate. However, an assessment of omitted property by the board of review in the manner provided in this Act shall not be subject to review by any succeeding board.

For the purpose of enforcing the provisions of this Act, the several taxing bodies interested therein are hereby empowered to employ counsel to appear before the board and take all necessary steps to enforce the assessment on such omitted property.

(4) On complaint in writing that any property described in such complaint is incorrectly assessed, the board shall review the assessment, and correct it, as shall appear to be just. Such complaint to affect the assessment for the current year shall be filed on or before the first day of August in counties with less than 150,000 inhabitants and on or before the first day of September in counties with 150,000 or more but less than 1,000,000 inhabitants: Provided, that if the assessment books containing the assessment complained of are not filed with the board of review by the 10th day of July in a county with less than 150,000 inhabitants or by the 10th day of August in a county with 150,000 or more but less than 1,000,000 inhabitants, then such complaint shall be filed on or before 20 calendar days after the date of publication of the assessment list pursuant to Section 103 of this Act.[2] The board may also of its own motion, at any time before its revision of the assessments is completed in every year, increase, reduce or otherwise adjust the assessment of any individual or corporation, on real property or personalty, making changes in the valuation thereof as may be just, and shall have full power over the assessment of any individual or corporation, and may do anything in regard thereto that it may deem necessary to make a just assessment; but no assessment shall be increased until the person or corporation to be affected shall have been notified, and given an opportunity to be heard, except as hereinafter provided; and before making any reduction in assessments of its own motion, the board of review shall give notice to the board of assessors, assessor or supervisor of assessments which certified the assessment, and give such assessor or supervisor of assessments an

[2] Chapter 120, § 584.

opportunity to be heard thereon. All complaints of errors in assessments, real or personal, shall be in writing, and shall be filed by the complaining party with the board of review, in duplicate, and the duplicate shall be forthwith filed by the board of review with the board of assessors, assessor or supervisor of assessments certifying such assessment. Complaints relating to real estate shall be classified by towns or taxing districts by the clerk of the board of review, and complaints relating to personal property shall be classified in such manner as the board of review shall determine by order for that purpose, duly entered of record; all classes of complaints shall be docketed numerically, each in its own class, in the order in which they shall be presented as near as may be, in books kept for that purpose, which books shall always be open to public inspection. Complaints relating to real estate shall be considered by towns or taxing districts and complaints relating to personal property shall be heard in their order by classes, in pursuance of the order of the board heretofore mentioned, until all complaints have been heard and passed upon by the board.

(5) Increase or reduce the entire assessment of either real or personal property, or both, or of any class included therein if, in its opinion, the assessment has not been made upon the proper basis, or equalize the assessment of real or personal property, by increasing or reducing the amount thereof, in any township, or part thereof, or any portion of the county as may, in its opinion, be just, but the assessment of any class of property or of any township or part thereof, or any portion of the county, shall not be increased until the board shall have published a notice in a newspaper of general circulation published in the county, of such proposed increase and shall have given the owners of the property affected, or any one representing them, or other citizens of said territory, an opportunity to be heard within 20 days after the date of such publication. The board of assessors, assessor or supervisor of assessments shall have like opportunity to be heard thereon,

except where such action is taken in individual cases upon complaint. The board shall hear any person, upon request, in opposition to a proposed reduction in the assessment of any person, corporation or territory.

(6) The board of review shall hear and determine the application of any person who is assessed on property claimed to be exempt from taxation. If the board shall determine that any such property is not liable to taxation and the question as to the liability of such property to taxation has not previously been judicially determined, the decision of the board shall not be final unless approved by the Department; and it shall be the duty of the clerk of the board in all cases, under the direction of the board, to make out and forward to the Department, a full and complete statement of all the facts in the case. If the Department is satisfied that such property is not legally liable to taxation, it shall notify the board of review of its approval of such decision, and the board shall correct the assessment accordingly. But if the Department is satisfied that such property is liable to taxation, it shall advise the board of its objections to such decision and the assessment upon such property shall not be removed from the assessment list, but the persons making application for such exemption may offer the claim of exemption as a defense in any judicial proceeding for the collection of taxes on such assessment, and, whenever such defense is offered, the question of exemption shall be determined by the judgment or order of the court. In either case, the extension of taxes on any such assessment shall not be delayed by any proceedings under this paragraph, and, in case the property is decided to be exempt, any taxes extended upon such unauthorized assessment shall be abated or, if already paid, shall be refunded.

(7) The board of review shall, at any time before judgment, if an error or mistake is discovered (other than errors of judgment as to the valuation of any real or personal property), in an assessment of any real or personal property belonging to

any person or corporation, issue a certificate setting forth the nature of such error and the cause or causes which operated to produce such error or mistake, to the person or corporation erroneously assessed, which such certificate when properly endorsed by the board of assessors, assessor or supervisor of assessments showing his concurrence therein and not otherwise may be used in evidence in any court of competent jurisdiction, and when so introduced in evidence, such certificate shall become a part of the court records, and shall not be removed from the files except upon the order of the court.

After the board of review has issued a certificate of error and it has been properly endorsed by the board of assessors, assessor or supervisor of assessments, 2 copies of such certificate of error shall be made and one copy given to the county clerk and one copy given to the collector. The county clerk shall keep records of the changes or corrections made in the certificate and shall certify such corrections to the collector so that he can account for the proper amount of taxes chargeable to him. Amended by P. A. 79-1363, § 21, eff. Oct. 1, 1976; P. A. 79-1454, § 56, eff. Aug. 31, 1976.

675. Payment of taxes—Payments under protest] § 194. Except as otherwise provided in Section 224.1 of this Act,[1] current taxes on real property shall be payable in 2 equal installments. The collector, when so requested by the party paying the taxes, shall receive and receipt for such taxes in installments. The collector shall receive taxes on part of any lot, piece or parcel of land charged with taxes when a particular specification of the part is furnished. If the tax on the remainder of such lot or parcel of land remains unpaid, the collector shall enter such specification in his return, so that the part on which the tax remains unpaid may be clearly known. The tax may be paid on an undivided share of real estate. In such case the collector shall designate on his record upon whose undivided share the tax has been paid.

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[1] Chapter 120, § 707.1.

If any person desires to object pursuant to Section 235 of this Act[2] to all or any part of a real property tax for any year, for any reason other than that the real estate is not subject to taxation, he shall first pay all of the tax installments due, and such payment shall be accompanied by a writing, substantially in the following form:

Payment under protest.

Vol. No. ..... Item No. ..... (as the same appear on the General Tax Bill). Original amount of tax $..... Amount of payment $..... This payment shall be applied to the taxes of all taxing bodies ratably, subject to refund of .....% of the tax, which is objected to on the ground (here set forth ground of objection) and is, accordingly, made under protest.

Name of taxpayer.....
Address.....

The person protesting shall present to the collector 2 copies of the written protest signed by himself. The collector shall write or stamp the date of receiving the same upon the copies, and sign the same, one of which copies he shall retain and the other he shall deliver to the person making the payment under protest.

In counties having 1,000,000 or more inhabitants, and in other counties which have adopted the method provided for in Section 224.1, any such written protest, whether of all or any part of a real property tax, shall be presented to the Collector at the time of payment of the second installment of said tax and at no other time.

The person paying real estate taxes under protest shall appear in the next application for judgment and order of sale and object to the taxes in relation to which the protest is made, and upon his failure so to do, the protest shall be waived, and judgment and order of sale entered for any unpaid balance of such taxes.

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[2] Chapter 120, § 716.

When any such objection is filed in a county of fewer than 1,000,000 inhabitants, there shall also be filed a duplicate copy for the use of the State's Attorney and a triplicate copy for the use of the county clerk of such county. Any such objection or amendment thereto filed in a county of fewer than 1,000,000 inhabitants shall contain on the first page thereof a listing of the tax levying units against which the objection is directed. Within 10 days thereafter the clerk of the circuit court shall deliver one copy to the State's Attorney and one copy to the county clerk, taking their receipts therefor. The county clerk shall, within 30 days from the last day for the filing of objections, notify the duly elected or appointed custodian of funds for each tax levying unit, whose tax monies may be affected by such objection, that such objection has been filed. Any amendment filed to such objection, except any amendment permitted to be made in open court during the course of a hearing on such objection, shall likewise be filed in triplicate, with the duplicate copy delivered to the State's Attorney and the triplicate copy delivered to the county clerk by the clerk of the circuit court as hereinabove provided in the case of original objections, and the State's Attorney shall within 10 days of receiving his copy of such amendment notify the duly elected or appointed custodian of funds for each tax levying unit whose tax monies may be affected by such amendment that such amendment has been filed. The State's Attorney shall also notify such custodian and the county clerk in writing of the date, time and place of any hearing before the court to be held upon such objection or amended objection not later than 4 days prior to the hearing thereon. The notices provided herein shall be by letter addressed to such custodian or the county clerk and may be mailed by regular mail, postage prepaid, post-marked within the 30 day period or the 10 day period, as the case may be, but not less than 4 days before a hearing.

In all counties, when the taxpayer appears and filed objection, the court shall, after first determining that due notice, if required, has been given to the tax levying unit, hear and

determine the matter according to the right of the case and enter judgment for any part of the taxes, or order a refund of any part of the taxes, so paid under protest. Appeals shall lie from such orders of the court as in other cases of objection to judgment and order of sale for taxes. Refunds shall be made by the collector in accordance with the final orders of the court, and the amount of such refunds shall be deducted from the taxes of the taxing bodies whose taxes were adjudged illegal, in the same or a subsequent year. Proceedings upon objections filed under this Section are subject to Section 194a.[3]

Where any tax is paid in full and protested as herein provided before the delinquent taxes are transcribed into the tax judgment, sale, redemption and forfeiture record, and the taxpayer appears and files objection, the collector, within such time as may be fixed by the court, shall file a transcript from the tax warrant book showing the tax, and such transcript shall be an amendment to the tax judgment, sale, redemption and forfeiture record, and the case shall proceed as if the tax had been originally transcribed therein.

In the payment of real or personal property taxes or any installment of real property taxes, the collector shall first apply such payments to interest (including interest added upon forfeiture to real property taxes) and costs, and after the payment of interest and costs such payments shall be applied upon the total tax of real or personal property upon which the payments are made.

No protest shall prevent or be a cause of delay in the distribution of tax collections among the taxing bodies of any taxes collected which are not paid under protest. The collector may withhold from distribution the amounts paid under protest or ½% of the total taxes collected, whichever is less. The

[3] Chapter 120, §675a.

collector shall deduct from the taxes of any taxing body for any year the amount of any tax for any year held illegal by the final order of a court, and use the amount deducted to equalize the distribution.
Amended by P.A. 79-350, § 1 eff. Oct. 1, 1975.

716. Proceedings by court—Form of order—Cure of error or informality.] § 235. The court shall examine the list, and if defense (specifying, in writing, the particular cause of objection) be offered by any person interested in any of the lands or lots, to the entry of judgment against them, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be: Provided, that no person shall be permitted to offer any such defense unless such writing specifying the particular cause of objection shall be accompanied by an official original or duplicate tax collector's receipt, showing that all taxes to which objection is made have been paid under protest pursuant to the provisions of section 194 of this Act; [1] and it shall be the duty of all tax collectors to furnish such duplicate receipt without charge.

If any party objecting to any tax paid under protest is entitled to a refund of the amount, or any part thereof, so paid under protest, the court shall give judgment for such taxes and special assessments and penalties as shall appear to be due, and such judgment shall be considered as a several judgment against each tract or lot or part of a tract or lot, for each kind of tax or special assessment included therein; and the court shall direct the clerk to make out and enter an order for the sale of such real property against which judgment is given, which shall be substantially in the following form:

Whereas, due notice has been given of the intended application for a judgment against such lands and lots, and no sufficient defense having been made or cause shown why

[1] Chapter 120, § 675.

judgment should not be entered against such lands and lots, for taxes (special assessments, if any), interest, penalties and costs due and unpaid thereon for the year or years herein set forth, therefore it is considered by the court that judgment be and is hereby entered against the aforesaid tract, or tracts, or lots (as the case may be), in favor of the People of the State of Illinois, for the sum annexed to each, being the amount of taxes (and special assessments, if any), interest, penalties and costs due severally thereon; and it is ordered by the court that the said several tracts of lots of land, or so much of each of them as shall be sufficient to satisfy the amount of taxes (and special assessments, if any), interest, penalties and costs annexed to them severally, be sold as the law directs.

The order shall be signed by the judge. In all judicial proceedings of any kind, for the collection of taxes and special assessments, all amendments may be made which, by law, could be made in any personal action pending in such court, and no assessment of property or charge for any of the taxes shall be considered illegal on account of any irregularity in the tax lists or assessment rolls, or on account of the assessment rolls or tax lists not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax list without name, or in any other name than that of the rightful owner; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collection of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof; and any irregularity or informality in the assessment rolls or tax lists, or in any of the proceedings connected with the assessment or levy of such taxes, or any omission or defective act of any other officer or officers connected with the assessment or levying of such taxes, may be, in the discretion of the court, corrected, supplied and made to conform to law by the court, or

by the person (in the presence of the court) from whose neglect or default it was occasioned. Provided, that where separate advertisement and application for judgment and order of sale is made on account of delinquent special taxes or special assessments in all cities, villages and incorporated towns in counties containing a population exceeding 1,000,000 inhabitants by the last preceding census of the United States or of this State, and in cities, villages and incorporated towns in other counties in which the county board by resolution has extended the time in which the return, required in section 209,[2] may be made, the procedure shall in all respects be the same as in this section prescribed, except that there shall be two separate judgments and orders for sale, one on account of delinquent special taxes and special assessments and the other on account of delinquent general taxes.

Amended by P.A. 76-2254, § 1, eff. July 1, 1970.

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[2] Chapter 120, § 690.

No. 80-2164

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RUSSELL G. SCHLENZ and NANCY A. SCHLENZ,
Lake County, Illinois Appellants,

and

GERTRUDE ANDERSON and 1300 CONSOLIDATED CASES,
Shelby County, Illinois Appellants,

v.

JOHN W. CASTLE, ROBERT JASPER, THE LAKE COUNTY, ILLINOIS, BOARD OF REVIEW, SHELBY COUNTY, ILLINOIS and the ILLINOIS PROPERTY TAX APPEAL BOARD,
Appellees.

On Appeal From The Supreme Court Of Illinois

APPELLANTS' BRIEF IN OPPOSITION TO LAKE COUNTY APPELLEES' MOTION TO DISMISS

PAUL E. HAMER
1356 Shermer Road
Northbrook, Illinois 60062
(312) 272-1800

JACK L. URETSKY
135 S. LaSalle Street
Chicago, Illinois 60603
(312) 372-7842

Attorneys for Appellants

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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In The

Supreme Court of the United States

October Term, 1981

RUSSELL G. SCHLENZ and NANCY A. SCHLENZ,
Lake County, Illinois Appellants,

and

GERTRUDE ANDERSON and 1300 CONSOLIDATED CASES,
Shelby County, Illinois Appellants,

v.

JOHN W. CASTLE, ROBERT JASPER, THE LAKE COUNTY, ILLINOIS, BOARD OF REVIEW, SHELBY COUNTY, ILLINOIS and the ILLINOIS PROPERTY TAX APPEAL BOARD,
Appellees.

On Appeal From The Supreme Court Of Illinois

APPELLANTS' BRIEF IN OPPOSITION TO LAKE COUNTY APPELLEES' MOTION TO DISMISS

INTRODUCTION

Lake County Appellees assert in total disregard of the record that the 1300 Shelby County assessments "will still have to be reviewed by the Property Tax Appeal Board".[1] Lake County Appellees attempt also to collaterally attack an earlier holding of the Supreme Court of Illinois by asserting that none of the plaintiffs "have been prejudiced or injured in any way by either the late publication of assessments, or the enactment of the validation legislation".[2] Appellees then erroneously conclude that this case falls under the mantle of *United States v. Heinszen & Co.*, 206 U.S. 370 (1907) and its successors rather than *Forbes Pioneer Boat Line v. Board of Commissioners*, 258 U.S. 338 (1922) and *Ettor v. City of Tacoma*, 228 U.S. 148 (1913) and their progeny and therefor presents "no substantial federal question." Appellees' conclusion fails partly because it is based upon erroneous factual assumptions. The conclusion also fails because Appellees' argument points out the reason that this case presents a substantial federal due process question, namely, the possibility of reaching different conclusions on the same set of facts under the *Forbes* and *Ettor* line of cases on the one hand and the *Heinszen* line of cases on the other hand.

Lake County Appellees' arguments are also supportive of appellants' contention that this case presents a

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[1] Lake County's motion at 6 and also at 9. Statement of Additional Facts, *infra*. It is notable that the Lake County Appellees did not serve either Appellee Property Tax Appeal Board or Appellee Shelby County with their motion.

[2] Motion at 9. *Andrews v. Foxworthy*, 71 Ill. 2d 13, 22-24, 373 N.E. 2d 1332, 1336-1337 (1978).

substantial federal equal protection question. Appellees do not deny (Motion at 14-16) that the legislative classification depriving appellants of their rights to refund was wholely arbitrary (see Jurisdictional Statement at 16-18). Appellees do not contend that the de facto discrimination among injured taxpayers imposed by Public Act 80-1471 was "reasonable" by any standard ever accepted by this Court.

This Court should therefore take plenary jurisdiction and reverse upon the due process and equal protection issues raised by appellants.

STATEMENT OF ADDITIONAL FACTS

The Shelby County case reached the state courts by an administrative review of a final decision of the Illinois Property Tax Appeal Board (Appendix D. A-21)[3] The Property Tax Appeal Board held a "mass hearing" and found that Shelby County's 1976 assessment increases were void (Decision of the Board, Supp. Appendix B, p. SA-7). The Board found that Shelby County's Supervisor of Assessments failure to make timely publication, when she effectively "sat" on the assessments for nine months, was not an excusable error (Decision of the Board, Supp. Appendix B, pp. SA-6, SA-7).

The Circuit Court of Shelby County, the Honorable Daniel H. Dailey, reversed (without remand) and re-

[3] Citation is to the Jurisdictional Statement. Citation to appellants' Supplemental Appendix attached to this Answer will label pages as "SA".

stored the original assessment. (Order of January 23, 1979, Supp. Appendix A, p. SA-2).

The Appellate Court reversed the circuit court affirming the order of the property tax appeal board. (Appendix D, p. A-25).

The Supreme Court of Illinois reversed the Appellate Court and affirmed the judgment of the Circuit Court of Shelby County. There was no remand (Appendix A, p. A-13).

In the Lake County case, the Supreme Court of Illinois remanded "the cause to the circuit court of Lake County to determine whether an appropriate sub-class of plaintiffs can be shown to exist". (Appendix A, p. A-13).

ARGUMENT

I.

LAKE COUNTY APPELLEES' RELIANCE UPON INCORRECT FACTUAL ASSERTIONS EMPHASIZES THE IMPORTANCE OF THE FEDERAL DUE PROCESS ISSUE PRESENTED BY THIS APPEAL.

The Lake County appellees note the existence of competing lines of retrospective taxation cases represented respectively by *Forbes* and by *Heinszen*. A[1]pellees then rely upon totally incorrect assertions of fact in order to argue that this case is completely controlled by *Heinszen*, although the high court of another State, on similar facts, chose to follow the rationale of *Forbes* as anticipated in *Ettor. Washington National Arena Limited Partnership v. Treasurer, Prince George's County*, 410 A.2d 1060 (Md. 1980).

It was factually incorrect to represent to this Court that the Shelby County assessments "will still have to be reviewed by the Property Tax Appeal Board" (Motion at 6, 9). The record does not support the statement. On the contrary, the record shows that the State proceedings are at an end (SA-2, SA-7, A-25, A-13). The Tax Appeal Board order was final (SA-7). Each court's order was a reversal without remand. Nothing further remains to be done unless this Court acts.

It was also factually incorrect to assert that none of the plaintiffs were prejudiced by the late publication (Motion at 9). The assertion runs squarely counter to the Supreme Court of Illinois' holding in *Andrews*. In that case, as appellees allege in this case, each taxpayer "had the same opportunity to appear before the board of review that he would have had if publication had been" timely. 71 Ill. 2d 13, 25, 373 N.E. 2d 1332, 1337

(Underwood, J. dissenting). Nevertheless, the majority found that timely publication is required "for a taxpayer to . . . be able to compare his assessment with other taxpayers". 71 Ill. 2d 13, 22, 373 N.E. 2d 1332. A last minute, rushed hearing before a board of review was presumably held to be an insufficient opportunity for a taxpayer to investigate other assessments and determine the fairness of his own.

In any event, appellees fail to take account of the fact that the failure to make timely publication in Shelby County resulted from the wilful action of the Supervisor (SA-7).

Also, the Court considered in *Andrews* that a taxpayer's right to his prior assessment became vested on the statutory publication date, saying:

> "it is our opinion that the legislature intended that taxpayers can at least rely on the July 10 deadline in nonquadrennial years where increases are not necessarily expected" (71 Ill. 2d 13, 24, 373 N.E. 2d 1332, 1337).

Consequently, it may be presumed that any real property sales after the statutory notice date, for example, were made in expectation that the *status quo* would be maintained. Lake County appellees are, of course, precluded from arguing that the Lake County plaintiffs should have exhausted their administrative remedies. No such state issue can remain in view of the Supreme Court of Illinois remand of the Lake County case for determination of possible sub-classes.

Appellees' misapprehension of the facts removes any possible basis from their contention that the *Heinszen* decision controls this case. Analysis of *Heinszen* and its progeny shows that their conclusion would be suspect in any event. Justice Harlan's concurrence in *Heinszen*

strongly suggests that the principal opinion rested upon grounds unnecessary to the decision. See *Heinszen* at 391. It is undoubtedly true that Congress had the power to withdraw "the consent of the United States to be sued on account of claims of that character" *Id.* Thus, the fact that *Heinszen, Rafferty v. Smith, Bell & Co.*, 257 U.S. 226 (1921) and *Graham v. Goodcell*, 282 U.S. 403 (1931) all deal with the powers of Congress and not of the States makes them poor authority against *Forbes* and *Ettor*, which deal with the power of the States as limited by the Fourteenth Amendment.

Appellees have cited no case construing the Fourteenth Amendment to support their position. This Court should therefore take plenary jurisdiction and reverse the Supreme Court of Illinois upon due process grounds.

II.

APPELLEES HAVE FOUND NO AUTHORITATIVE DECISION SUPPORTING THEM AGAINST APPELLANTS' SUBSTANTIAL CLAIM FOR RELIEF UNDER THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

Appellant taxpayers assert that their Fourteenth Amendment right to equal protection was violated by a statute retrospectively and arbitrarily obliterating their right to tax refunds when similarly situated taxpayers had received such refunds. Lake County appellees respond, citing *Heinszen*, that the equal protection clause was not offended by the arbitrary distinction between those who could recover and those who could not according to date of final judgment. Appellees' argument offends both logic and the opinion they cite.

The argument offends logic because the right to recover in fact depended not merely upon the legislative

action but also upon the acts of the County officials, as is seen most clearly in Shelby County. Shelby County obviously appealed the Tax Appeal Board decision because the county officials knew that the curative act was pending in the legislature. Had the County not appealed, the tax appeal board decision would have been final and the curative act would have been of no effect. It would therefore be unrealistic to argue that appellants were barred from recovery merely by a neutral and rational legislative distinction. The Shelby County record shows and the Lake County appellants could show at trial, that they were victimized by special legislation aimed directly at them.[4]

The argument offends *Heinszen* because neither that case nor its cited progeny reached the equal protection issue. *Heinszen* was decided on Fifth Amendment grounds many years before this Court held that "Fifth Amendment . . . due process carries a mandate of equal protection". *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 361 (1973).

Appellees' other case citations are inapt. In *Fisher Controls v. Commonwealth*, 981 A.2d 1253 (Pa. 1977) the legislature had, at the end of the year, raised the tax rate for that year on corporations reporting on a calendar year basis. Fisher Controls was successor to a company that had ceased doing business during the year. The Court, one justice dissenting, noted that Fisher was not challenging the statute and held that Fisher failed to

[4] A principal target of the special legislation may have been the Commonwealth Edison nuclear plant in Lake County. Edison was an *amicus* in the Illinois reviewing courts. See, e.g. the published opinion below.

prove purposeful discrimination in administration. *Fisher* is inaptly cited because, unlike *Fisher*, the present appeal presents a statutory challenge.

Lake Shore Auto Parts holds that Illinois could reasonably distinguish between individuals and corporations for purpose of levying a personal property tax. In the instant case, there was no rational basis for determining which taxpayers would pay taxes on untimely published assessments and which would not.

Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959), similarly to *Lake Shore Auto Parts*, held that there was a rational distinction between Ohio residents and nonresidents for purpose of the *ad valorem* taxation of merchandise or agricultural property stored in a warehouse. The Lake County appellees make no suggestion whatsoever that there was a rational basis supporting the Illinois Legislature's determination that the instant appellants should lose their right to tax refunds, as opposed to taxpayers subjected to earlier or later untimely published assessments.

Appellees have totally failed to support their bare recitation that this case presents no substantial federal question. The equal protection question presented is in fact substantial because the Supreme Court of Illinois opinion is counter to prevailing authority as set out in the Jurisdictional Statement

This Court should reverse upon Equal Protection grounds.

CONCLUSION

The Lake County appellees' motion demonstrates at best, that there are presently conflicting lines of cases from this Court related to retrospective "curative" state statutes validating illegal acts of taxing authorities. That conclusion supports appellants' contention that this case presents substantial federal due process and equal protection questions.

This Court should therefore take this case under its plenary jurisdiction and reverse the Supreme Court of Illinois.

Respectfully submitted,

PAUL E. HAMER
1356 Shermer Road
Northbrook, Illinois 60062
(312) 272-1800

JACK L. URETSKY
135 S. LaSalle Street
Chicago, Illinois 60603
(312) 372-7842

Attorneys for Appellants

SUPPLEMENTAL APPENDIX A

[Filed January 23, 1979]

IN THE CIRCUIT COURT FOR THE FOURTH JUDICIAL CIRCUIT OF ILLINOIS SHELBY COUNTY, ILLINOIS

COUNTY OF SHELBY, STATE OF ILLINOIS,

Plaintiff,

No. 78-MR-9 *vs.*

STATE OF ILLINOIS, PROPERTY TAX APPEAL BOARD

Defendant,

and

GERTRUDE ANDERSON,

Taxpayer-Defendant.

ORDER

This cause coming on to be heard upon a Complaint for Administrative Review from the decision of the State of Illinois, Property Tax Appeal Board; and no answer, appearance or other pleading having been filed by the defendants, or any of them, in this cause; and this Court having examined the record herein and having heard the arguments of counsel, hereby FINDS:

1. That it has jurisdiction of the parties hereto and the subject matter hereof.

2. That a copy of the decision of the defendant, Property Tax Appeal Board, filed herein by the attorney for plaintiff, in pertinent part provides:

> "The opinion of the Illinois Supreme Court in *Andrews vs. Foxworthy* 71 Ill. 2d 13 (1978) states that

Section 103 of the Revenue Act of 1939 (Ill. Rev. Stat. 1975, Chap. 120, Par. 584) is mandatory and requires strict and timely compliance. . . .

Therefore, after a complete review of the facts and in consideration of the statutory law as interpreted by the Illinois Supreme Court, the Property Tax Appeal Board finds that the assessment increases on the properties before us are void due to an untimely publication."

3. That the assessed valuation set by the defendant, Property Tax Appeal Board, on the instant cause is $4000 subject to the "state applied multiplier".

4. That the People of the State of Illinois represented in the General Assembly have enacted, prior to any judgment herein, a validating act, duly approved and made effective, validating and making legal and effective all assessments of real property and the extension of taxes on the same, irrespective of a failure to make a timely publication.

5. That the said validating act is applicable to the case at bar.

6. That the instant decision of the defendant, Property Tax Appeal Board, should be reversed.

WHEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED that the instant decision of the defendant, Property Tax Appeal Board, be, and the same is hereby reversed in whole pursuant to Illinois Revised Statutes, Ch. 110, Para. 275(1)(e) and the original assessment of the instant parcel by the Board of Review of Shelby County, Illinois is hereby re-instated.

ENTERED this 23rd day of January, 1979.

/s/ DANIEL H. DAILEY
Judge of the Circuit Court

STATE OF ILLINOIS,
County of Shelby } ss.

I, the undersigned Clerk of the Circuit Court, and Ex-Officio Recorder in and for the said County, in the State aforesaid, do hereby certify the above and foregoing to be a true and complete copy of Order 79-MR-9

as the same appears of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, this 26th day of March A. D. 1979.

Charles P. Bob Hampton
Clerk of the Circuit Court ~~and Ex-Officio Recorder~~.

SA-3

* NOTE: TO BE FILED IN QUADRUPLICATE *

STATE OF ILLINOIS
PROPERTY TAX APPEAL BOARD
303 E. Monroe St.
SPRINGFIELD, ILLINOIS 62706
(217) 782-6076

76-1706-FI



PETITION FOR REAL PROPERTY ASSESSMENT APPEAL FOR THE YEAR 19 77

APPELLANT Gertrude Anderson (If appellant is other than owner, give name & address of owner)

ATTORNEY FOR APPELLANT (If so represented)

ADDRESS 2312 Shelby Avenue

Mattoon 61939 234-2713
City Zip Code Telephone

ADDRESS

City Zip Code Telephone

Petition is hereby made to appeal from the final decision of the Shelby County Board of Review relating to the property described below. Notice of such decision was postmarked on June 27, 1977.
DATE

County Identification Parcel No. 21-27-00-200-001
Address of Property
Township Big Spring Legal Description W ½ NE 80 acs

(Continue on reverse side)

SUPPLEMENTAL APPENDIX B

SA-1

( ) Contention of Law (Attach Brief)
(✓) Overvaluation
( ) Undervaluation

1. ( ) Residential
2. ( ) Commercial
3. ( ) Industrial
4. (✓) Farm
5. ( ) Other

The assessment placed on the real property for said tax year is as follows:

1. By the Assessor	Land $ 2325.-	Impr.	Total $ 2325.-
2. By the Board of Review:	Land $ 2325.-	Impr.	Total $ 2325.-
3. Appellant's claim:	Land $ 18,600	Impr.	Total $ 18,600

LINES NO. 1, 2 AND 3 MUST BE COMPLETED - INFORMATION AVAILABLE AT BOARD OF REVIEW

Date July 22, 1977 APPELLANT OR AGENT Gertrude Anderson
Margaret M. Haviland, atty in fact

STATE TAX APPEAL BOARD'S DECISION

The State Tax Appeal Board from the facts and exhibits presented finds the decision of Shelby County Board of Review to be incorrect and that the correct assessed valuation of the property is:

LAND 4000 IMPR. _____ TOTAL 4000

_____ Chairman

DISSENTING: _____

_____ Member

DATE _____

_____ Member

DOCKET NUMBER 76-1706-F-1

_____ Clerk, Property Tax Appeal Board

Final administrative decisions of the Property Tax Appeal Board are subject to review in the Circuit Court under the provisions of the Administrative Review Act. A complaint for such review must be filed within 35 days of the date of this decision.

PTAB-1 (4-74)

SA-5

The appellants, Members of the Shelby County Taxpayers Association, appealed their 1976 property tax assessments. The appellants are represented by Attorneys Robert L. Jennings and Patrick M. Flynn of the Firm of Jennings, Tedesco & Flynn and also Mr. Vernon L. Plummer.

The appellants contend that the assessment increases are invalid or in the alternative that the valuations determined for the appellants' properties by the Shelby County Board of Review from the Cole-Layer-Trumble Company reappraisal are inequitable because Cole-Layer-Trumble personnel used inappropriate soil maps and the staff was incompetent.

The Shelby County Board of Review is represented by Mr. E. C. Eberspacher, Shelby County's State's Attorney. At the hearing conducted April 26, 1978, Mr. Eberspacher filed a written objection to the "Mass Hearing." This objection was overruled by Chairman Morris due to the discussion at a prehearing conference held at the Springfield office of the Property Tax Appeal Board before the "Mass Hearing" was set. Oral objection to the mass hearing was received from the State's Attorney approximately two weeks before the actual hearing date.

The Property Tax Appeal Board finds that the following uncontroverted facts were established in the record:

1. Cole-Layer-Trumble Company performed appraisal work in Shelby County during 1975.
2. Cole-Layer-Trumble Company's final work product which was specified under a contract, "Exhibit No. 1", was completed and delivered to the Supervisor of Assessments' Office in March, 1976.
3. On or about December 6, 1976, notices of changes in assessments were mailed by the Supervisor of Assessments to Shelby County Taxpayers.
4. December 10, 1976, the asessment changes were published.

5. All appellants in these proceedings had received an assessment increase and have had a hearing before the Shelby County Board of Review.
6. The Supervisor of Assessments testified on page 32 of the transcript of the proceedings:

   ". . . I believe in September before the Board meeting they assured the County Board tat if we assessed a 33⅓ we would receive a one multiplier and that is what we were waiting on to actually put the assessment on until we were sure that it was an assessment that would not increase with the multiplier."

The Property Tax Appeal Board has jurisdiction to determine the threshold legal issue whether assessment increases in a non-quadrennial year are valid without the publication of the intended changes by the Supervisor of Assessments before July 10th as required by statute.

The opinion of the Illinois Supreme Court in *Andrews vs. Foxworthy* 71 Ill.2d 13 (1978) states that Section 103 of the Revenue Act of 1939 (Ill. Rev. Stat. 1975, Chap. 120, Par. 584) is mandatory and requires strict and timely compliance.

The Property Tax Appeal Board finds that the Supervisor of Assessments' failure to make timely publication is not saved or excused by the fact that her office is understaffed and that such an inability to comply with the publication date is not the type of clerical error specified under Section 235 of the Revenue Act of 1939 (Ill. Rev. Stat. 1975, Chap. 120, Par. 716).

Therefore, after a complete review of the facts and in consideration of the statutory law as interpreted by the Illinois Supreme Court, the Property Tax Appeal Board finds that the assessment increases on the properties before us are void due to an untimely publication.

Upon ruling by the Property Tax Appeal Board, all cases were combined in one hearing and one signed

decision is made for all cases. The correct assessed valuation is indicated on the PTAB-1 for each parcel and is subject only to the state applied multiplier.

_____
Chairman

_____
Member

_____
Member

DATE August 17, 1978

_____
Clerk